Supreme Court, U.S.
FILED

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No. 10-785

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In The

Supreme Court of the United States

MEGAN KRAINSKI,

Petitioner,

v.

THE STATE OF NEVADA, ex rel. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of the UNIVERSITY OF NEVADA, LAS VEGAS, a Political Subdivision of the State of Nevada, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Is the heightened pleading standard imposed on federal civil rights claims by the Ninth Circuit – in conflict with decisions from other courts of appeals – contrary to this Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)?

2.

Is the refusal to allow a plaintiff to amend her complaint, when the plaintiff has established that additional facts exist which would make the claims plausible, contrary to this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962), particularly when the Foman Factors were not applied and the court misapprehended the facts?

3.

Has this Court's rulings in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) altered the availability of Rule 15(a) relief to a plaintiff?

RULE 14.1(b) STATEMENT

A list of parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Plaintiff-Appellant and Petitioner: Megan Krainski.

Defendants-Appellees and Respondents: THE STATE OF NEVADA, ex rel. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of the UNIVERSITY OF NEVADA, LAS VEGAS; a Political Subdivision of the State of Nevada; REBECCA MILLS, individually and as Vice President for Student Life of the University of Nevada, Las Vegas; RICHARD CLARK, individually and as Director of Student Conduct and Residential Life of the University of Nevada, Las Vegas; PHILLIP BURNS, individually and as Senior Student Conduct Officer of the University of Nevada, Las Vegas; NANNETTE JIMENEZ, individually and as a Student Conduct Officer of the University of Nevada, Las Vegas; SUSAN M. CARRASCO, individually and as Assistant General Counsel of the University of Nevada, Las Vegas; TYREE PINI, individually and as Assistant Residential Life Coordinator; LESLIE WALLENFELDT, individually and as Residential Life Coordinator of the University of Nevada, Las Vegas; OFFICER BRETT GOFF, P#302, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER L. TRAMPOSCH,

RULE 14.1(b) STATEMENT – Continued

P#312, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER J. CULVER, P#309, individually and as a police officer with the University of Nevada, Las Vegas Police Department.

Defendant in District Court: KENYA POLEE, individually.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 14.1(b) STATEMENT	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	7
A. This Court Should Grant Certiorari To Determine Whether The Ninth Circuit Has Imposed A Heightened Pleading Standard For Claims Brought Under 42 U.S.C. § 1983	8
1. The Allegations Pled	8
2. The Panel's Decision Is In Conflict With This Court's Pleading Requirement For A § 1983 Claim For Violation Of Fourth Amendment Rights, And Actually Creates A Heightened Pleading Standard In The Ninth Circuit For Civil Rights Cases	11

TABLE OF CONTENTS – Continued

Page

B. This Court Should Grant Certiorari To Determine If The "Foman Factors" Remain A Requirement Under Rule 15(a) When A District Court Denies An Opportunity To Amend Claims "Without Any Justifying Reason" 15

CONCLUSION 18

APPENDIX

August 2, 2010 Opinion of the Court of Appeals for the Ninth Circuit ..... App. 1

October 20, 2008 District Court Opinion and Order Granting in Part and Denying in Part Defendant University and University Defendants' Motion to Dismiss Plaintiff's Complaint (#33) and Motion for Sanctions (#34), and Defendant Polee's Motion to Dismiss (#36) ..... App. 23

September 10, 2010 Ninth Circuit Order Denying Petition for Rehearing ..... App. 28

TABLE OF AUTHORITIES

Page

CASES:

Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937 (2009) ..... *passim*

Baldwin v. Placer County, 418 F.3d 966 (9th Cir. 2005) 6, 13, 14

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) ..... *passim*

Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 (1957) 16, 17

Educadores Puertorrequenos en Accion v. Hernandez, 367 F.3d 61 (1st Cir. 2004) 14

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227 (1962) 15, 16, 17, 18

Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002) 14

Goad v. Mitchell, 297 F.3d 497 (6th Cir. 2002) 14

Hoskins v. Poelstra, 320 F.3d 761 (7th Cir. 2003) 15

Krainski v. Nevada ex rel. Bd. of Regents of Nevada System of Higher Educ., 616 F.3d 963 (9th Cir. 2010) ..... *passim*

Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053 (9th Cir. 2004) 6, 17

Thomas v. Independence Tp., 463 F.3d 285 (3rd Cir. 2006) 14

Walker v. Thompson, 288 F.3d 1005 (7th Cir. 2002) 14

TABLE OF AUTHORITIES – Continued

Page

Wilson v. Strong, 156 F.3d 1131 (11th Cir. 1998).....15

Wynder v. McMahon, 360 F.3d 73 (2nd Cir. 2004).....14

CONSTITUTION:

U.S. Const. amend. IV.....*passim*

FEDERAL STATUTES:

28 U.S.C. § 1254(1).....2

28 U.S.C. § 2101(c).....1

42 U.S.C. § 1983.....*passim*

RULES:

Fed. R. Civ. P. 8(a).....6, 7, 11, 12, 13

Fed. R. Civ. P. 9(b).....15

Fed. R. Civ. P. 12(b)(6).....6, 7, 11

Fed. R. Civ. P. 15(a).....7, 15, 17

Sup. Ct. R. 13.1.....1

Sup. Ct. R. 13.3.....1

OTHER AUTHORITIES:

Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).....17

PETITION FOR WRIT OF CERTIORARI

Megan Krainski respectfully petitions for writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the Ninth Circuit, dated August 2, 2010, is officially reported at 616 F.3d 963 (9th Cir. 2010) and is reproduced at App. 1-22.

The opinion and order of the U.S. District Court for the District of Nevada, dated October 20, 2008, is reproduced at App. 23-27.

The order of the U.S. Court of Appeals for the Ninth Circuit denying further review and rehearing en banc, dated September 10, 2010, is reproduced at App. 28-29.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed was entered on August 2, 2010. The order denying rehearing en banc was entered on September 10, 2010. The petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 & 13.3 because it is being filed within 90 days after the denial of a timely petition for rehearing. This Court has jurisdiction to review the

judgment of the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision involved is 42 U.S.C. § 1983, which states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is an action for civil rights violations pursuant to 42 U.S.C. § 1983, and pendent state tort claims. On April 2, 2008, Petitioner filed a complaint in this U.S. District Court for the District of Nevada.

On June 9, 2008, Respondents the State of Nevada, ex rel. Board of Regents of the Nevada System of Higher Education, on behalf of the University of Nevada, Las Vegas; a Political Subdivision of the State of Nevada ("Defendant University") and Rebecca Mills, individually and as Vice President for Student Life of the University of Nevada, Las Vegas; Richard Clark, individually and as Director of Student Conduct and Residential Life of the University of Nevada, Las Vegas; Phillip Burns, individually and as Senior Student Conduct Officer of the University of Nevada, Las Vegas; Nannette Jimenez, individually and as a Student Conduct Officer of the University of Nevada, Las Vegas; Susan M. Carrasco, individually and as Assistant General Counsel of the University of Nevada, Las Vegas; Tyree Pini, individually and as Assistant Residential Life Coordinator; Leslie Wallenfeldt, individually and as Residential Life Coordinator of the University of Nevada, Las Vegas; Officer Brett Goff, P#302, individually and as a police officer with the University of Nevada, Las Vegas Police Department; Officer L. Tramposch, P#312, individually and as a police officer with the University of Nevada, Las Vegas Police Department; Officer J. Culver, P#309, individually and as a police officer with the University of Nevada, Las Vegas Police

Department ("University Defendants") filed a Motion to Dismiss Plaintiff's Complaint. On July 11, 2008, Plaintiff filed an Opposition to Motion to Dismiss. On July 25, 2008, Defendant University and University Defendants filed a Reply to Plaintiff's Opposition to Motion to Dismiss.

On October 14, 2008, the District Court, before Judge James C. Mahan, held a hearing on Defendants' Motion to Dismiss. Judge Mahan granted in part, Defendants' Motion to Dismiss, dismissing Plaintiff's federal claims under 42 U.S.C. § 1983, including claims alleging violations of due process, unlawful arrest and imprisonment, and unlawful search and seizure. App. 23-27. However, the District Court denied Defendants' Motion to Dismiss numerous state tort claims, but declined jurisdiction of those claims. *Id.* It is those federal § 1983 causes of action, dismissed pursuant to the October 20, 2008, order, which Petitioner appealed to the U.S. Court of Appeals for the Ninth Circuit. Petitioner's state claims continue to be litigated in a Nevada state court.

The District Court provided little analysis or explanation of its decision. *Id.* Moreover, the District Court did not consider a request by the Petitioner to amend her complaint, and did not address this request in its order, simply granting the motion to dismiss "with prejudice." App. 26.

On December 3, 2009, the Ninth Circuit panel held an oral argument on the appeal, and issued a decision on August 2, 2010. *Krainski v. Nevada ex rel.*

Bd. of Regents of Nevada System of Higher Educ., 616 F.3d 963 (9th Cir. 2010). The decision of the panel sets forth a heightened pleading requirement for the Petitioner's 42 U.S.C. § 1983 claim against the University officials. The panel stated that Petitioner "conceded that there were no new facts that she would include in the complaint" to overcome its perceived shortcomings, which is contrary to counsel's statements at oral argument. *Id.* at 972. In fact, Petitioner's counsel stated:

> We certainly are aware of many more facts now than we were when we first drafted the complaint. So essentially, the allegations we could add to the complaint at this point is to be more specific about the actual conspiracy that took place, who it occurred between, what school officials were actually involved in this.

Id. at 973.

In a strongly worded dissent by Judge Betty B. Fletcher, she states that the panel and district court erred by dismissing Petitioner's Fourth Amendment claim and abused its discretion by dismissing the complaint without leave to amend. *Id.* at 972-973.

Judge Fletcher opined that the panel's decision is in conflict with this Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 1950 (2009), in that Petitioner "alleges more than simply that UNLV police lacked probable cause to arrest her. She alleges in some detail the factual circumstances under which

the arrest took place." *Krainski* at 972. "She also alleges facts that explain why the police lacked probable cause" within the body of the complaint, thus fully complying with Federal Rule of Civil Procedure 8(a) and sufficient enough "to survive a motion under Rule 12(b)(6)." *Id.* at 972-973.

Judge Fletcher continued that the panel's upholding of the dismissal without leave to amend is also improper as it is not clear, upon *de novo* review, that the complaint could not be saved by any amendment, as set forth in *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). *Krainski* at 973. Judge Fletcher argued that due to the panel overlooking Petitioner counsel's statement that there are additional allegations that could be pled to save the complaint, the panel's decision directly conflicts with *Thinket Ink Info Res., Inc. Krainski* at 973.

Additionally, Judge Fletcher pointed out that the panel's decision is contrary to the Ninth Circuit's decision in *Baldwin v. Placer County*, 418 F.3d 966, 970-71 (9th Cir. 2005), which clearly sets forth that when police officers know or should have known that the allegations against an accused are false, there is no probable cause to arrest the accused and an arrest at that point is a violation of the Fourth Amendment. *Krainski* at 972.

On August 18, 2010, Petitioner timely filed a Petition for Rehearing En Banc or for Panel Rehearing. On September 10, 2010, the Ninth Circuit issued an

order denying the petition by a vote of 2-1, with Judge Fletcher voting in favor of granting the petition. App. 28-29.

REASONS FOR GRANTING THE PETITION

In affirming the District Court's enhanced pleading requirement for civil rights cases, and refusing to allow Petitioner to amend her complaint when clearly the complaint could have been saved by amendment, the Ninth Circuit has decided an important federal question in a way that conflicts with this Court's decisions regarding pleading requirements and pleading amendments.

Not only does the decision of the Ninth Circuit impact the application of Federal Rule of Civil Procedure 12(b)(6), Rule 8(a), and Rule 15(a), but how those rules are specifically applied to federal civil rights claims, brought pursuant to 42 U.S.C. § 1983. This is a question of federal law that has not been, but should be, settled by this Court in order to provide definitive and final guidance on this issue.

This Court should grant certiorari to address an issue affecting one of the most common types of civil cases filed in our federal courts and to enable uniform application of the standards set forth by this court in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).

A. This Court Should Grant Certiorari To Determine Whether The Ninth Circuit Has Imposed A Heightened Pleading Standard For Claims Brought Under 42 U.S.C. § 1983.

1. The Allegations Pled.

Petitioner Megan Krainski brought an action for civil rights violations pursuant to 42 U.S.C. § 1983, including claims alleging violations of due process, unlawful arrest and imprisonment, and unlawful search and seizure. In the Fall 2007, Krainski enrolled as a student at the University of Nevada Las Vegas and resided in UNLV's campus residential housing with Respondent Kenya Polee. Polee was a prominent student-athlete at UNLV and was listed on the University's website as "the top long jumper for the Rebels . . . among the top long jumpers in the MWC (Mountain West Conference)."

On September 10, 2007, Krainski met with University employee, Respondent, Leslie Wallenfeldt, and advised her of continuous and unyielding harassment and threats made by Polee to Krainski. Rather than conducting an investigation and commencing disciplinary actions against Polee, in an attempt to protect their star athlete, Wallenfeldt and Respondent, Tyree Pini, informed Polee of Krainski's allegations against her. Before Krainski had an opportunity to file a formal complaint against her roommate, Pini, Wallenfeldt and Polee conspired to fabricate a story about Petitioner attempting to attack Polee with a pair of scissors.

Pini, Wallenfeldt, and Polee contacted UNLV Police and made false statements to the arriving officers, Respondents, Brett Goff, L. Tramposch, and J. Culver, in an attempt to have Krainski arrested. The UNLV Police officers made no investigation into Polee's claim that Krainski attacked her with a pair of scissors, and no physical evidence of an attack existed whatsoever. As such, Goff, Tramposch, and Culver knew, or should have known, the allegations made by Respondent Polee were false, but still arrested Krainski for the alleged crime of Assault with a Deadly Weapon in order to further the conspiracy to protect UNLV's star track athlete. The officers arrested Krainski and incarcerated her at the Clark County Detention Center, causing her to lose her liberty and causing severe psychological trauma and physical injury. The criminal charges against Krainski were eventually dismissed in January 2008.

On April 2, 2008, Krainski filed a Complaint in this case setting forth the factual circumstances under which her arrest took place, which showed the Respondents violated Krainski's Fourth Amendment rights. Specifically, the Complaint alleged:

> 27. On September 11, 2007, Defendants WALLENFELDT and PINI contacted Defendant POLEE, without Plaintiff's consent and in breach of confidentiality, and informed her of the allegations made by Plaintiff, and conspired with Defendant POLEE to fabricate a story about Plaintiff attempting to attack POLEE with a pair of scissors, all before

> Plaintiff would have an opportunity to file a formal complaint against Defendant POLEE.
>
> 28. Defendants WALLENFELDT, PINI, and POLEE then contacted UNLV Police and made false statements to police officer in an attempt to have Plaintiff arrested.
>
> 29. Defendant Officers GOFF, TRAMPOSCH, and CULVER, knew, or should have known, that the allegations made by Defendant POLEE were false, but arrested Plaintiff for the alleged crime of Assault with a Deadly Weapon.
>
> 30. Prior to making the arrest, Defendant Officers GOFF, TRAMPOSCH, and CULVER did not conduct any investigation into the claims made by Defendant POLEE, and had no probable cause or warrant to arrest Plaintiff.

Defendant University and University Defendants filed a Motion to Dismiss Plaintiff's Complaint in the District Court, which granted Defendants' Motion to Dismiss Plaintiff's federal claims under 42 U.S.C. § 1983. App. 23-27.

The Ninth Circuit panel affirmed the District Court's decision. *Krainski v. Nevada ex rel. Bd. of Regents of Nevada System of Higher Educ.*, 616 F.3d 963 (9th Cir. 2010). Judge Thomas wrote the opinion, which was joined by Judge Smith, which sets forth a heightened pleading standard for Krainski's § 1983 claims, which is not required under the Federal Rules of Civil Procedure, and is inconsistent with prior

holdings of this Court, and several other Circuit Courts of Appeal.

2. The Panel's Decision Is In Conflict With This Court's Pleading Requirement For A § 1983 Claim For Violation Of Fourth Amendment Rights, And Actually Creates A Heightened Pleading Standard In The Ninth Circuit For Civil Rights Cases.

Although the Petitioner set forth the elements of her claim against the UNLV officers for violation of her Fourth Amendment right to be free from warrantless arrest without probable cause, and that the officers knew or should have known probable cause to arrest Petitioner was not present, in addition to her due process claims, the panel found that this pleading did not satisfy the pleading requirements when the officers raised the defense of qualified immunity. *Krainski* at 969. In the decision of the panel, Judge Thomas stated that Petitioner failed to allege in her complaint or at oral argument any facts suggesting that any of the officers had a reason to suspect the falsity of the statements made by the victim and two other university employees. *Id.* The panel stated that Petitioner merely alleged in a conclusory fashion that the officers knew or should have known that the allegations against Krainski were false. *Id.* The panel suggested that in order to satisfy the pleading requirements under Fed. R. Civ. P. 8(a) and survive a motion to dismiss under 12(b)(6), Petitioner must set forth additional facts suggesting that the officers had

a reason to suspect the falsity of the statements made by the victim and two other university employees. *Id.* This ruling establishes a heightened pleading requirement that is inconsistent with Fed. R. Civ. P. 8(a) and this Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).

As is stated by Judge Betty B. Fletcher in her panel dissent, Krainski's complaint is more than mere legal conclusions or a recital of the elements of a cause of action. *Krainski* at 972. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. at 1949, citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. at 1965. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* In pleading her claim for violation of her Fourth Amendment rights, Krainski alleged more than the elements of her claim that university officers lacked probable cause to arrest her. Petitioner alleged that the university officers knew or should have known the allegations against Krainski were false. The Petitioner further alleged, in support of her claim that the university officers knew or should have known the allegations against Krainski were false, that the university officers conducted no investigation prior to arresting Krainski, and no physical evidence

of the attack alleged against Petitioner existed. *Krainski* at 972-973.

In her complaint, Krainski clearly set forth the factual basis for her claim against the university officers for violation of her Fourth Amendment rights, and asserted more than a legal conclusion or a recitation of the elements. Petitioner's allegations that the university officers knew or should have known the allegations against Krainski were false, that they conducted no investigation prior to arresting her, and that no physical evidence of the alleged attack perpetrated by Krainski existed, makes Petitioner's claim plausible on its face. As Judge Fletcher pointed out, Krainski's complaint explains not only the surrounding circumstance of her claim for violation of her Fourth Amendment rights such as where, when, and how the claim arose, but the precise manner in which the university officers lacked probable cause to arrest her. *Krainski* at 972-973. The panel's requirement that any additional factual pleading is required is contrary to this Court's decision in *Iqbal* and *Twombly*, and contrary to the notice pleading requirements of Fed. R. Civ. P. 8(a), thereby creating an incorrect interpretation of those pleading requirements in the Ninth Circuit.

The panel's decision is contrary to prior precedent, not only in other circuits, but in the Ninth Circuit. In *Baldwin v. Placer County*, 418 F.3d 966 (9th Cir. 2005), the Ninth Circuit established that police officers are only entitled to qualified immunity from § 1983 actions for violations of the Fourth

Amendment when a reasonable police officer would have believed the conduct alleged against him was legal. In this case, Krainski alleged in her complaint that the UNLV police officers knew or should have known their conduct was illegal when they arrested her without conducting an investigation, without any physical evidence of the charges against her, and without probable cause. No reasonable police officer would believe his conduct was legal if he arrested a suspect knowing the allegations against the suspect were false. *See Baldwin*, 418 F.3d at 970-971. Accordingly, Krainski's allegations against the UNLV police officers are clearly sufficient to survive the officer's qualified immunity defense with regard to a motion to dismiss.

The panel's decision is also clearly contrary to *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002), which states that the federal courts may not require a heightened pleading of improper motive in constitutional tort cases against individual officers. *Id.* at 1127. This Court further stated in *Galbraith* that "nearly all of the circuits have now disapproved any heightened pleading standard in cases other than those governed by Rule 9(b)." *Id.* at 1125. *See e.g. Educadores Puertorrequenos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004); *Wynder v. McMahon*, 360 F.3d 73 (2nd Cir. 2004); *Thomas v. Independence Tp.*, 463 F.3d 285 (3rd Cir. 2006); *Goad v. Mitchell*, 297 F.3d 497 (6th Cir. 2002); *Walker v. Thompson*, 288 F.3d 1005 (7th Cir. 2002);

Hoskins v. Poelstra, 320 F.3d 761 (7th Cir. 2003); *Wilson v. Strong*, 156 F.3d 1131 (11th Cir. 1998).

While this case is clearly not one subject to Rule 9(b), the panel has nonetheless created a reported case that applies similar heightened pleading requirements to all civil rights cases filed in the circuit. The panel decision is contrary to this Court's intent in *Iqbal* and *Twombly*, thus respectfully requiring that the matter be addressed by this Court and to maintain uniformity among the circuits on this important issue.

B. This Court Should Grant Certiorari To Determine If The "Foman Factors" Remain A Requirement Under Rule 15(A) When A District Court Denies An Opportunity To Amend Claims "Without Any Justifying Reason."

In *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227 (1962), this Court held:

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant,

> repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, *but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.*

371 U.S. at 182, 83 S. Ct. at 230 (emphasis added); *see also Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957).

In this case, the District Court simply ignored Petitioner's motion to amend the complaint, and granted the motion to dismiss with prejudice. App. 26. In defending the District Court, the majority of the Ninth Circuit panel stated that Krainski "conceded that there were no new facts that she would include in the complaint" to overcome its perceived shortcomings. *Krainski* at 972. This conclusion by the panel is contrary to counsel's statements at oral argument. In fact, Petitioner's counsel argued:

> We certainly are aware of many more facts now than we were when we first drafted the complaint. So essentially, the allegations we could add to the complaint at this point is to be more specific about the actual conspiracy that took place, who it occurred between,

> what school officials were actually involved in this.

Id. at 973.

Realizing the errors of the panel majority, Judge Fletcher made clear in her dissent that even assuming Krainski's pleading was not sufficient to survive a motion to dismiss, that she could easily amend the complaint to "specify why and how the police 'knew or should have known, that the allegations [against her] were false.'" *Id.* Judge Fletcher stated that it is "easy to think of an amendment that could save the complaint." *Id.* Her dissent points out that the findings of the panel majority not only misconstrue the facts, but are directly in conflict with the Ninth Circuit's decision in *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). *Krainski* at 973.

More importantly to this Court, the Ninth Circuit's decision eliminates the factors established in *Foman*, allowing the District Courts in that circuit to ignore their requirement under Rule 15(a) to apply the factors. As in *Foman*, the District Court here issued just an "outright refusal to grant leave without any justifying reason." 371 U.S. at 182, 83 S. Ct. at 230 (emphasis added). Guidance is needed from this Court to determine how Rule 15(a) applies post-*Twombly* and *Iqbal*. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 88-89 (2010).

While the complaint satisfied the pleading requirements and set forth facts sufficient to state a plausible claim, even if it was not, the Petitioner could easily amend the complaint to "specify why and how the police 'knew or should have known, that the allegations [against her] were false.'" *Krainski* at 972-973. For that reason, this Court should grant Certiorari to determine if the application of the Foman Factors remain mandatory on the district court's following this Court's decisions in *Twombly* and *Iqbal*.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEGAN KRAINSKI,

Plaintiff-Appellant,

v.

STATE OF NEVADA EX. REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of University of Nevada, Las Vegas; REBECCA MILL; RICHARD CLARK; PHILLIP BURNS; NANNETTE JIMINEZ; SUSAN CARRASCO; TYREE PINI; LESLIE WALLENFELDT; BRETT GOFF; L. TRAMPOSCH; J. CULVER; KENYA POLEE,

Defendants-Appellees.

No. 08-17523

D.C. No. 2:08-cv-00417-JCM-GWF

OPINION

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued December 3, 2009
Submitted August 2, 2010
San Francisco, California

Filed August 2, 2010

Before: Betty B. Fletcher, Sidney R. Thomas and N. Randy Smith, Circuit Judges.

Opinion by Judge Thomas;
Partial Concurrence and Partial Dissent by
Judge B. Fletcher

COUNSEL

Jason Bach; Las Vegas, Nevada; for the appellant.

Richard C. Linstrom; Las Vegas, Nevada; Susan Carrasco O'Brien; Las Vegas, Nevada; Christian James Gabroy; Henderson, Nevada; for the appellees.

OPINION

THOMAS, Circuit Judge:

Megan Krainski appeals the district court's dismissal of her Section 1983 action against the University of Nevada, Las Vegas ("UNLV")[1] and various UNLV employees ("UNLV Employees")[2] in their personal and official capacities. Krainski alleges constitutional and state law violations arising from

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[1] State of Nevada ex. Rel. Board of Regents of the Nevada System of Higher Education, on behalf of the University of Nevada.

[2] The "University Employees" include Rebecca Mills, Vice President for Student Life; Richard Clark, Director of Student Conduct and Residential Life; Phillip Burns, Senior Student Conduct Officer; Nannette Jimenez, Student Conduct Officer; Susan M. Carrasco, Assistant General Counsel; Tyree Pini, Assistant Residential Life Coordinator; Leslie Wallenfeldt, Assistant Residential Life Coordinator; and UNLV police officers Brett Goff, L. Tramposch, and J. Culver.

an altercation with her former roommate, Kenya Polee, that led to Krainski's arrest and subjection to university discipline.[3] The district court dismissed Krainski's federal claims with prejudice and declined to exercise jurisdiction over the remaining state law claims. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

According to Krainski's complaint, Krainski and Polee roomed together in residential housing at UNLV. According to the complaint, Polee was "a prominent student-athlete at UNLV, listed on the University's website as 'the top long jumper for the Rebels . . . among the top long jumpers in the MWC (Mountain West Conference).'" Krainski's complaint states that her troubles began on September 10, 2007, when she met with Defendant Wallenfeldt and "advised her of ongoing harassing and threatening behavior" by Polee. Krainski alleges that, in

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[3] Krainski also named Polee as a defendant. Polee responded by filing a third-party complaint with cross-claims in which she sought to implead Yvonne Scott-Williams, head coach of the UNLV track team, as a third-party defendant. Polee alleged that UNLV and Williams wrongfully removed her from the track team and revoked her scholarship in retaliation for her defense of Krainski's lawsuit; she also sought a preliminary injunction reinstating her onto the track team. The district court dismissed Polee's federal claims and denied the motion for a preliminary injunction. We disposed of Polee's appeal in *Krainski v. Mill*, 356 Fed. App'x 951 (9th Cir. 2009) (unpublished).

"retaliation for her making a complaint against a star athlete":

> 27. On September 11, 2007, Defendants WALLENFELDT and PINI contacted Defendant POLEE, without Plaintiff's consent and in breach of confidentiality, and informed her of the allegations made by Plaintiff and conspired with Defendant POLEE to fabricate a story about Plaintiff attempting to attack POLEE with a pair of scissors, all before Plaintiff would have an opportunity to file a formal complaint against Defendant POLEE.
>
> 28. Defendants WALLENFELDT, PINI, and POLEE then contacted UNLV Police and made false statements to police officer [sic] in an attempt to have Plaintiff arrested.
>
> 29. Defendant Officers GOFF, TRAMPOSCH, and CULVER, knew, or should have known, that the allegations made by Defendant POLEE were false, but arrested Plaintiff for the alleged crime of Assault with a Deadly Weapon.
>
> 30. Prior to making the arrest, Defendant Officers GOFF, TRAMPOSCH, and CULVER did not conduct any investigation into the claims made by Defendant POLEE, and had no probable cause or warrant to arrest Plaintiff.

As a result of these actions, Krainski alleges that she was wrongly incarcerated, restricted of her liberty, and subjected to psychological harm.

Krainski further alleges that UNLV, Mills, Clark, Burns, Jimenez, and Carrasco then proceeded to wrongly initiate student disciplinary proceedings against her. Her complaint explains:

> 32. In October 2007, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO brought formal charges against Plaintiff for alleged violations of the University of Nevada, Las Vegas Student Conduct Code. . . .
>
> 33. Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO failed to provide Plaintiff with proper notice of the formal hearing. . . .
>
> 34. Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO held a formal hearing on November 13, 2007, at which time they each failed to allow Plaintiff to be represented and/or assisted by her advisers, despite the explicit representation made by Defendants that Plaintiff would be allowed to be represented and/or assisted by said advisers, intentionally causing Plaintiff to be ineffective at representing herself at said hearing. . . .
>
> 35. Despite the fact that no evidence was ever presented to support any of the allegations made against Plaintiff, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO found Plaintiff to be "Responsible" of said charges, completely ignoring the evidence that exonerated Plaintiff,

> forever tarnishing the educational transcript and record of Plaintiff, as well as causing severe psychological and physical injuries. . . .

Krainski alleges that the defendants' actions "depriv[ed] her of the opportunity to obtain an education and further her career."

Krainski raised three constitutional claims before the district court: procedural due process under the Fifth and Fourteenth Amendments; substantive due process under the Fifth and Fourteenth Amendments; and Fourth Amendment unlawful arrest and imprisonment. In addition to monetary damages, she sought "a Permanent Injunction, prohibiting the Defendants and their agents from placing a hold on her academic transcript or placing any notation of findings or sanctions against her in her student file or upon her transcript."

UNLV and the UNLV Employees subsequently filed a motion to dismiss Krainski's complaint. The district court granted the motion, reasoning that Eleventh Amendment immunity barred Krainski's constitutional claims against UNLV and the UNLV Employees in their official capacities, and that qualified immunity barred Krainski's federal claims against the UNLV Employees in their personal capacities. Additionally, the district court determined that Krainski failed to state a claim for violation of her Fourth Amendment rights, her substantive due process rights, and her procedural due process rights. After dismissing Krainski's federal claims with

prejudice, the district court declined to exercise jurisdiction over the remaining state law claims. This timely appeal followed.

II

The district court did not err in dismissing Krainski's claims against UNLV and the UNLV Employees in their official capacities, a decision we review de novo. *Yakima Indian Nation v. State of Wash. Dep't of Revenue*, 176 F.3d 1241, 1245 (9th Cir. 1999).

"The Eleventh Amendment bars suits against the State or its agencies for all types of relief, absent unequivocal consent by the state." *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir. 1999) (citing *Pennhurst v. Halderman*, 465 U.S. 89, 100 (1984)). The Eleventh Amendment jurisdictional bar applies regardless of the nature of relief sought and extends to state instrumentalities and agencies. *See Papasan v. Allain*, 478 U.S. 265, 276 (1986).

Eleventh Amendment immunity also shields state officials from official capacity suits. *See Central Reserve Life of N. Am. Ins. Co. v. Struve ("Central Reserve")*, 852 F.2d 1158, 1160-61 (9th Cir. 1988). A narrow exception exists "where the relief sought is prospective in nature and is based on an ongoing violation of the plaintiff's *federal* constitutional or statutory rights." *Id.* at 1161 (emphasis in original); *see also Papasan*, 478 U.S. at 277-78; *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 660

(9th Cir. 2009) ("[A] plaintiff may . . . maintain a federal action to compel a state official's prospective compliance with the plaintiff's federal rights.") (citations omitted).

We conclude that the district court properly dismissed Krainski's claims against UNLV under the Eleventh Amendment. Krainski concedes that the Nevada University system and its constituent institutions are agencies and instrumentalities of the State of Nevada within the meaning of the Eleventh Amendment. *See Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 883 n.17 (9th Cir. 2004) (noting that the Nevada System of Higher Education is immune from suit under the Eleventh Amendment). Accordingly, the district court properly dismissed Krainski's claims against UNLV.

The district court also properly dismissed the claims against the UNLV Employees in their official capacities. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (clarifying that suits against state officials in their official capacity are no different from suits against the state itself).

Krainski also asserts a theory under *Monell* that her constitutional rights were infringed by a "de facto policy" of UNLV and the UNLV Employees. *See Monell v. Dep't of Social Servs. of N.Y.*, 436 U.S. 658, 690 n.55, 691 (1978). However, the Supreme Court has expressly declined to extend *Monell*'s theory of municipal liability under § 1983 to state entities. *Will*, 491 U.S. at 70-71. Accordingly, Krainski may

not bring an action against UNLV or the UNLV Employees in their official capacities under *Monell*.

III

The district court properly dismissed Krainski's constitutional claims against the UNLV Employees in their personal capacities on the basis of qualified immunity.

State officials are entitled to qualified immunity from suits for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Determining whether officials are owed qualified immunity involves two inquiries: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case." *Al-Kidd*, 580 F.3d at 964 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal quotation marks omitted). "It is within our 'sound discretion' to address these two prongs in any sequence we see fit." *Al-Kidd*, 580 F.3d at 964 (quoting *Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808, 818 (2009)).

A

The district court properly concluded that UNLV police officers Goff, Tramposch and Culver violated Krainski's Fourth Amendment right to be free from warrantless arrest absent probable cause. A warrantless arrest must be supported by probable cause to comport with the Fourth Amendment. *Henry v. United States*, 361 U.S. 98, 102 (1959). "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that [an] offense has been committed." *Id.* "[E]ven if the officers were mistaken that probable cause to arrest . . . existed, they are nonetheless immune from liability if their mistake was reasonable." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1443 (9th Cir. 1991) (citation and footnote omitted).

Here, Krainski herself admitted that UNLV police officers Goff, Tramposch and Culver arrested her pursuant to statements by Polee and two UNLV Residential Life Coordinators and other investigative information indicating that Krainski had attacked Polee with a pair of scissors. Krainski failed to allege in her complaint or at oral argument any facts suggesting that any of the officers had a reason to suspect the falsity of the statements made by the victim and two other university employees; instead, she merely alleged in a conclusory fashion that the officers "knew, or should have known, that the allegations . . . were false" and that they failed to conduct an adequate investigation. The record does not contain any information that would create a genuine

issue of material fact as to whether the officers had facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and that Krainski was the perpetrator. We conclude that qualified immunity applies, as "a reasonable police officer could have believed that his or her conduct was lawful" when arresting a suspect following a report from two university employees and a student alleging an attack. We thus affirm the district court's dismissal of Krainski's Amendment Fourth cause of action against the UNLV Employees based on the defendants' entitlement to qualified immunity.

B

The district court did not err in concluding that qualified immunity precluded Krainski's substantive due process claims against the individual defendants. In order to determine the viability of a qualified immunity claim, we determine whether the defendants violated a constitutional right and whether the constitutional right was clearly established at the time of the defendants' actions. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Under *Pearson v. Callahan*, 129 S.Ct. 808, 821 (2009), we may begin the qualified immunity analysis by considering whether there is a violation of clearly established law without determining whether a constitutional violation occurred.

The guarantee of substantive due process provides "heightened protection against government interference with certain fundamental rights and

liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The "liberty" guaranteed by the Due Process Clause has yet to be fully circumscribed and presents "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes ... that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Raich v. Gonzales*, 500 F.3d 850, 862 (9th Cir. 2007) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (citations omitted).

Krainski claims that her right of substantive due process was violated when a university official allegedly placed an unwarranted disciplinary notation on her transcript.[4]

To determine whether a constitutional right has been "clearly established" for qualified immunity purposes, we must "survey the legal landscape and examine those cases that are most like the instant case." *Trevino v. Gates*, 99 F.3d 911, 917 (9th Cir. 1996) (citations omitted). The inquiry "must be undertaken

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[4] The defendants dispute that any disciplinary notation was placed on her transcript, and Krainski has not placed the transcript into evidence.

in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201.

Krainski has been unable to present us with any binding or persuasive authority for the proposition that a substantive due process violation occurs when a university official places an unwarranted disciplinary notation on a transcript. The only case that has been cited to us as supporting that proposition is *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). There, the Supreme Court considered a public university student's dismissal on academic grounds from a six-year degree program. *Id.* at 215-16. The Supreme Court denied the student's substantive due process claim on factual grounds, "assum[ing] the existence" of a constitutionally protected interest that derived from "an implied contract right to continued enrollment free from arbitrary dismissal." *See id.* at 223; *see also id.* at 228-29 (Powell, J., concurring) (arguing that it was "unnecessary to assume the existence" of such a "dubious" right). Krainski's case presents a weaker claim to substantive due process protection than in *Ewing*, as she does not allege that she was suspended or dismissed from the university, but merely that she received a disciplinary notation on her record. In the absence of any other precedent affirming a substantive due process violation under facts analogous to those here, we are compelled to conclude that the contours of the right Krainski asserts were not sufficiently clear that a reasonable official would understand that what he or she is doing violates that right. Accordingly, we affirm the district

court's dismissal of the claim on the basis of qualified immunity without reaching the underlying constitutional question.

C

Finally, Krainski alleges that UNLV and various UNLV Employees violated her procedural due process rights in connection with a school disciplinary hearing. Qualified immunity protects the school officials from these claims.

A procedural due process claim has two elements: deprivation of a constitutionally protected liberty or property interest and denial of adequate procedural protection. *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998).

As we have previously noted, the doctrine of qualified immunity protects state actors when the constitutional right at issue was not "clearly established" at the time of the actions at issue. *Saucier*, 533 U.S. at 202. Here, the law was not clearly estalished that the type of injury Krainski alleges constituted a constitutionally protected "liberty" or "property" interest.

The Supreme Court has had occasion to consider this threshold inquiry in several cases. First, in *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that temporary suspensions of public high school students without notice or a hearing implicated the students' protected interest in "avoid[ing] unfair or

mistaken exclusion from the educational process, with all of its unfortunate consequences." *Id.* at 576. The Court reasoned that, "[h]aving chosen to extend the right to an education to people of appellees' class generally, [the state] may not withdraw that right on grounds of misconduct absent, fundamentally fair procedures to determine whether the misconduct has occurred." *Id.* at 574.

In *Board of Regents v. Roth*, the Supreme Court held that an assistant professor without tenure at a state university had no constitutionally protected liberty or property interest in his continued employment by the university. 408 U.S. 564, 569 (1972). In so holding, the Court observed in dicta that there was "no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* at 573.

Finally, in *Paul v. Davis*, the Supreme Court expressly circumscribed the reach of both *Roth* and *Goss* and held that "reputation alone, apart from some more tangible interests," does not constitute "'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 464 U.S. 693, 693, 701, 709-10 (1976); *see also WMX Technologies, Inc. v. Miller*, 80 F.3d 1315, 1319 (9th Cir. 1996) (announcing that *Paul* established a "stigma-plus test"). The plaintiff in *Paul* had challenged the dissemination to hundreds of merchants by police of a flyer listing him as an "active shoplifter" and

depicting his image. 464 U.S. at 695-96. Although he alleged that the "shoplifter" designation would damage his reputation and "seriously impair his future employment opportunities," the Supreme Court held that he did not state a claim for violation of his procedural due process rights. *Id.* at 697, 711-12.

Here, Krainski does not allege that the UNLV Employees suspended or expelled her for her conduct, or that she was otherwise deprived of an entitlement to education conferred by the state or secured by some other independent source or understanding. She instead alleges that the defendants damaged her reputation by charging her with violations of the Student Conduct Code; finding her "Responsible" of those charges; and "tarnishing [her] educational transcript and record." Such allegations amount to mere reputational injury within the meaning of *Paul* and, without more, do not rise to the level of a deprivation of a constitutionally protected liberty or property interest. Krainski's allegation of "loss of future income" is materially indistinguishable from the *Paul* plaintiff's assertion that the defamatory flyer would "impair his future employment opportunities." Likewise, allegations of "psychological trauma" are not sufficient to satisfy *Paul*'s "stigma-plus" test. *Rolon v. Henneman,* 517 F.3d 140, 148 (2d Cir. 2008) (humiliation, embarrassment, and emotional distress are not cognizable protected interests under *Paul*). Nor are or [sic] conclusory suggestions of the "loss of liberty." *Sprecher v. Graber,* 716 F.2d 968, 976 (2d Cir. 1983)

(speculative allegations as to loss of liberty insufficient). Thus, without opining as to the constitutionality of the conduct, we can easily conclude that the law was not clearly established at the time so as to put a reasonable official on notice that the actions might violate the constitution.

The district court properly granted judgment against Krainski on her claim for violation of procedural due process rights.[5]

IV

The district court did not abuse its discretion in denying Krainski leave to amend her complaint. *United States v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001) (citation omitted). "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). To survive a motion to

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[5] Krainski did not suggest in her complaint, her briefing, or at oral argument that the absence of counsel at the disciplinary hearing violated the constitution. At oral argument, she admitted that the defendants permitted an attorney to attend the hearing with her and conceded that she was not arguing that she was entitled to representation at the hearing. Therefore, the First Circuit's decision in *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978), is inapposite to the circumstances presented here, and we decline to address the circumstances raised in that case.

dismiss, a complaint must contain sufficient factual matter to state a facially plausible claim to relief. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Here, Krainski conceded that there were no new facts that she would include in her complaint to overcome its shortcomings. Under the circumstances, we conclude that the district court did not abuse its discretion in denying Krainski leave to amend her complaint.

AFFIRMED.

B. FLETCHER, Circuit Judge, concurring in part and dissenting in part:

The district court erred by dismissing Krainski's Fourth Amendment claim and abused its discretion by dismissing the complaint without leave to amend. I therefore respectfully dissent from the portion of the majority's opinion that affirms the district court's decision in those respects.

If the UNLV police officers who arrested Krainski knew or should have known that the allegations against her were false, the police officers would have violated the Fourth Amendment's clearly established prohibitions. *See Baldwin v. Placer County*, 418 F.3d 966, 970-71 (9th Cir. 2005). The majority, however, deems Krainski's Fourth Amendment claim too conclusory to survive.

Krainski's complaint is more than "legal conclusions" or a "recital[ ] of the elements of a cause of action," *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 1950 (2009), because she alleges more than simply that UNLV police lacked probable cause to arrest her. She alleges in some detail the factual circumstances under which the arrest took place. *See* Majority Op. at 11102-03. She also alleges facts that explain *why* the police lacked probable cause – namely, that the police "knew, or should have known, that the allegations [against her] were false."

That allegation is enough to satisfy Federal Rule of Civil Procedure 8(a) and to survive a motion under Rule 12(b)(6). The Supreme Court has expressly approved as adequate an analogous complaint alleging negligence. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 n.4 (2002) (quoting Fed. R. Civ. P. app. Form 9 (2000)). "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Fed. R. Civ. P. app. Form 9.[1] Just as Krainski's complaint does with respect to her Fourth Amendment claim, Form 9 sketches the factual circumstances out of which the legal claim for negligence arose – when, where, and in general terms, how the claim arose. But Krainski's complaint alleges more, for she

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[1] "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." Fed. R. Civ. P. 84.

explains not only the surrounding circumstances but the precise manner in which the police lacked probable cause to arrest her. Form 9, by contrast, simply alleges negligence without specifying *why* the driver was negligent (by driving too quickly, for example, or by being distracted). Krainski has adequately stated a claim for a violation of the Fourth Amendment.

Even if the majority were right that Krainski's Fourth Amendment allegations are conclusory, it would still be wrong to affirm the district court's dismissal without leave to amend.

The district court did not even address Krainski's request to amend her complaint. Because "[a] district court's failure to exercise discretion constitutes an abuse of discretion," *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1027 (9th Cir. 2007) (citation and quotation marks omitted), we should at least remand, requiring the district court to exercise its discretion one way or the other.

More importantly, it is easy to think of an amendment that could save the complaint from the majority's strictures – Krainski could specify why and how the police "knew, or should have known, that the allegations [against her] were false." The majority rightly acknowledges that "[d]ismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." Majority Op. at 11113 (quoting *Thinket*

Ink Info Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1061 (9th Cir. 2004)). Here it is clear that the complaint *could* be saved by amendment, even under the majority's evaluation of the current complaint. Krainski is entitled to an opportunity to cure any inadequacies in the complaint.

The majority wrongly asserts that Krainski conceded there were no new facts that she could use to save her complaint. At oral argument, when asked about how he could amend the complaint, counsel for Krainski stated:

> We certainly are aware of many more facts now than we were when we first drafted the complaint. So essentially, the allegations we could add to the complaint at this point is to be more specific about the actual conspiracy that took place, who it occurred between, what school officials were actually involved in this.

Oral arg. at 4:46-5:10. Part of the alleged conspiracy, of course, was the fact that the police officers who made the arrest knew or should have known that the allegations against Krainski were false. Counsel was thus telling us that he could be "more specific" about how and why the police officers knew or should have known the allegations to be false. The majority posits a concession that was never made.

Krainski is entitled to discovery to substantiate the Fourth Amendment claim she properly alleges in

her complaint; prepared to allege additional facts, she should also be allowed to amend her complaint.[2] I therefore dissent.

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[2] I note specifically that her due process claim – that she was not allowed representation at the disciplinary hearing while criminal charges were pending against her – could be more explicitly stated in an amended complaint. *See Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978).

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MEGAN KRAINSKI,

Plaintiff,

vs.

THE STATE OF NEVADA ex rel. BOARD OF REGENTS OF NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of THE UNIVERSITY OF NEVADA, LAS VEGAS; a Political Subdivision of the State of Nevada; REBECCA MILLS, individually and as Vice President for Student Life of the University of Nevada, Las Vegas; RICHARD CLARK, individually and as Director of Student Conduct and Residential Life of the University of Nevada, Las Vegas; PHILLIP BURNS,

CASE NO. 2:08-cv-00417-JCM-GWF

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT UNIVERSITY AND UNIVERSITY DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT (#33) AND MOTION FOR SANCTIONS (#34), AND DEFENDANT POLEE'S MOTION TO DISMISS (#36)

(Filed Oct. 20, 2008)

individually and as Senior Student Conduct Officer of the University of Nevada, Las Vegas; NANNETTE JIMENEZ, individually and as a Student Conduct Officer of the University of Nevada, Las Vegas; SUSAN M. CARRASCO, individually and as Assistant General Counsel of the University of Nevada, Las Vegas; TYREE PINI, individually and as Assistant Residential Life Coordinator; LESLIE WALLENFELDT, individually and as Assistant Residential Life Coordinator of the University of Nevada, Las Vegas; OFFICR [sic] BRETT GOFF, P#302, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER L. TRAMPOSCH, P#312, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER J. CULVER, P#309, individually and as a police officer with the University of Nevada, Las Vegas Police Department; KENYA POLEE, individually; DOES I-XX, inclusive.

Defendants.

Defendant University[1] and University Defendants'[2] Motion to Dismiss Plaintiff's Complaint (Document #33) and Motion for Sanctions (Document #34), along with Defendant/Counter-Plaintiff/Cross-Plaintiff Kenya Polee's Motion to Dismiss Plaintiff's Complaint (Document #36) came before this Court for hearing on October 14, 2008, with Jason Bach, Esq., appearing for Plaintiff Megan Krainski, Vice President and General Counsel Richard C. Linstrom appearing for the University and University Defendants, and Christian James Gabroy, Esq., appearing for Defendant/Counter-Plaintiff/Cross-Plaintiff Polee. After reviewing the pleadings submitted in support of and in opposition to these motions, having heard

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[1] The State of Nevada ex rel. Board of Regents on behalf of the Nevada System of Higher Education, on behalf of the University of Nevada, Las Vegas.

[2] Rebecca Mills, individually and as Vice President for Student Life of the University, Richard Clark, individually and as Director of Student Conduct and Residential Life of the University; Phillip Burns, individually and as Senior Student Conduct Officer of the University; Nannette Jimenez, individually and as a Student Conduct Officer of the University, Susan M. Carrasco, individually and as Assistant General Counsel of the University; Tyree Pini, individually and as Assistant Residential Life Coordinator of the University; Leslie Wallenfeldt, individually and as Assistant Residential Life Coordinator of the University; Officer Brett Goff, P#302, individually and as a police officer with the University's Police Department; Officer L. Tramposch, P#312, individually and as a police officer with the University's Police Department; and Officer J. Culver, P#309, individually and as a police officer with the University's Police Department.

argument of counsel and having reviewed the Court's file, and for good cause shown.

IT IS HEREBY ORDERED that Defendant University and University Defendants' Motion to Dismiss Plaintiff Krainski's Complaint (Document #33) and Motion for Sanctions (#34), as well as Defendant Polee's Motion to Dismiss (Document #36) are granted in part and denied in part. Each of Plaintiff's federal claims against the University and University Defendants are hereby dismissed with prejudice. The Court finds that Eleventh Amendment immunity bars such claims against the University, as a state entity, and the University Defendants, as state employees thereof acting in their official capacities. The Court further finds the University Defendants to be entitled to qualified immunity in their individual capacities as to their actions as alleged by Plaintiff. The Court also finds that Plaintiff failed to make out claims for violation of Fourteenth Amendment procedural due process, having alleged that she received some notice and a hearing, or substantive due process, having failed to allege violation of a cognizable fundamental liberty or property interest, or violation of the Fourth Amendment relative to search and seizure, having pled facts constituting probable cause to arrest her by the police officer defendants employed by the University. Having hereby dismissed Plaintiff Krainski's federal claims with prejudice, the Court declines to exercise jurisdiction over the remaining state law claims and therefore hereby dismisses such claims without

prejudice to Plaintiff's right to bring them in state court. Having made the above findings of fact and conclusion of law, the Court hereby denies the Motion for Sanctions (#34) as moot and denies Defendant/ Counter-Plaintiff/Cross-Plaintiff Kenya Polee's Motion to Dismiss Plaintiff's Complaint (#36), as Ms. Polee is not an employee of the University.

DATED this 17th day of October, 2008.

/s/ James C. Mahan
JAMES C. MAHAN
UNITED STATES
DISTRICT COURT JUDGE

Submitted By:

By: /s/
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEGAN KRAINSKI, Plaintiff-Appellant, v. STATE OF NEVADA EX. REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of University of Nevada, Las Vegas; REBECCA MILL; RICHARD CLARK; PHILLIP BURNS; NANNETTE JIMINEZ; SUSAN CARRASCO; TYREE PINI; LESLIE WALLENFELDT; BRETT GOFF; L. TRAMPOSCH; J. CULVER; KENYA POLEE, Defendants-Appellees.	No. 08-17523 D.C. No. 2:08-cv-00417-JCM-GWF District of Nevada, Las Vegas ORDER (Filed Sep. 10, 2010)

Before: B. FLETCHER, THOMAS and N.R. SMITH, Circuit Judges.

Judges Thomas and NR Smith have voted to deny the petition for rehearing and to reject the petition for rehearing en banc. Judge B Fletcher voted to grant the petition for rehearing and has recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are rejected.

No. 10-785

In the Supreme Court of the United States

MEGAN KRAINSKI,

Petitioner,

v.

NEVADA, EX REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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February 14, 2011

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QUESTIONS PRESENTED

I. Whether Petitioner, as the plaintiff in District Court, pled only bare assertions and conclusory allegations, resulting in a failure to state a claim upon which relief could be granted in accordance with this Court's standard of review established in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal*, ____ U.S. ____, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

II. Whether Petitioner, as the plaintiff in District Court, pled factual matter that, if taken as true, states a claim that Respondents, in their individual capacities, deprived her of a clearly established constitutional right?

III. Whether Petitioner's failure to properly raise the issue of leave to amend before the District Court and more significantly, failure to actually set forth any facts which might support a leave to amend, warranted denial of leave to amend.

LIST OF PARTIES

Petitioner has accurately presented a list of all parties to the proceeding in the court whose judgment is under review and, as such, Respondents incorporate Petitioner's Rule 14.1(b) Statement. (Petitioner's Petition for Writ of Certiorari, hereinafter referred to as "Pet" or "Petition" p.ii).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

CITATIONS OF OFFICIAL/UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS 1

CONCISE STATEMENT OF BASIS FOR JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

I. STATEMENT OF THE CASE 2

II. THE OPINIONS BELOW 4

III. ARGUMENT 8

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT'S DECISION TO DISMISS PETITIONER'S COMPLAINT BASED UPON *BELL ATL. CORP. V. TROWMBLY AND ASHCROFT V. IQBAL*, AS WELL AS PRINCIPLES OF QUALIFIED IMMUNITY, WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW . 8

A. The Ninth Circuit Court of Appeals Majority Correctly Applied Governing U.S. Supreme Court Pleading Standards 9

B. The Ninth Circuit Court of Appeals Majority Correctly Applied Governing U.S. Supreme Court Qualified Immunity Principles 12

C. The Ninth Circuit Court of Appeals Majority Correctly Determined Petitioner Failed to Set Forth New Facts Before the District Court, and for that matter, the Ninth Circuit, Which Petitioner Could Include in her Complaint to Overcome its Fatal Shortcomings 15

IV. CONCLUSION 20

APPENDIX

Appendix A: Complaint, United States District, District of Nevada (April 2, 2008) 1b

Appendix B: Opposition to Defendants Motion to Dismiss Plaintiff's Complaint, United States District Court, District of Nevada (July 11, 2008) 23b

Appendix C: Reporter's Transcript of Proceedings, United States District Court, District of Nevada, The Honorable James C. Mahan, Judge Presiding (October 14, 2008) 68b

TABLE OF AUTHORITIES

CASES

Anderson v. Creighton,
438 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) 13

Ashcroft v. Iqbal,
____ U.S. ____, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ..... *passim*

Beck v. Ohio,
379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964) 13

Bell Atl. Corp. v. Twombly,
550 U.S. 544, 127 S. Ct. 1955 (2007) .... *passim*

Foman v. Davis,
371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) 15

Harlow v. Fitzgerald,
457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) 12

Henry v. United States,
361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959) 13

Hope v. Pelzer,
536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) 13

Hunter v. Bryant,
502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam) 11, 14

Krainski v. NSHE et al.,
616 F.3d 963 (9th Cir. 2010) ..... *passim*

Lemmons v. Georgetown Univ. Hosp.,
241 F.R.D. 15, 100 Fair Empl. Prac. Cas. (BNA) 563, 89 Empl. Prac. Dec. (CCH) P 42,777 (D.D.C. 2007) 16

Mitchell v. Forsyth,
472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) 12

Monell v. Dep't of Social Servs. of N.Y.,
436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) 5

Pearson v. Callahan,
555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) 7, 12, 13, 14

Romero v. Wilson Elementary Sch. Distr. No. 7,
No. CV 05-2231-PHX-MHM, 2006 U.S. Dist. LEXIS 57652, 2006 WL 2374844 (D. Ariz. Aug. 15, 2006) 16

Saucier v. Katz,
533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) 12

Thomas v. R.I.,
542 F.3d 944, 71 Fed. R. Serv. 3d 944 (1st Cir. 2008) 16

United States v. 3 Parcels in La Plata Cnty.,
919 F. Supp. 1449, 1995 U.S. Dist. LEXIS 20664
(D. Nev. 1999) 17

United States ex. rel. Lee v. Fairview Health Sys.,
413 F.3d 748 (8th Cir. 2005) 16

CONSTITUTION

U.S. Const. amend. IV ..... *passim*

STATUTES

42 U.S.C. § 1983 ..... 1, 12

RULES

Fed. R. Civ. P 7(b)(1) 15, 16

Fed. R. Civ. P. 8(a)(2) 9

Fed. R. Civ. P. 15(a) 15

Local Rule 15-1(a) 3

OTHER AUTHORITIES

5 Charles Alan Wright et al., Federal Practice and
Procedure §§1191& 1192 (3d ed. 2004) 16

6 Charles Alan Wright et al., Federal Practice and
Procedure §§1473 & 1483 (3d ed. 2010) 15

CITATIONS OF OFFICIAL/UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS

Petitioner has accurately presented the citations of the official and unofficial reports of all opinions and orders entered in this case by courts and administrative agencies and, as such, Respondents incorporate Petitioner's "Opinions Below" Statement. (Pet. p.1).

CONCISE STATEMENT OF BASIS FOR JURISDICTION

Petitioner has accurately presented the basis for jurisdiction of this Court, including the statutory provisions and time facts on which jurisdiction rests and, as such, Respondents incorporate Petitioner's "Jurisdiction" Statement. (Pet. p.1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to statutory provision 42 U.S.C. § 1983, referenced to by Petitioner (Pet. p. 2), the Fourth Amendment of the U.S. Constitution is also involved in this case.

I.

STATEMENT OF THE CASE

Statement of the Case

Respondents' refer to and incorporate the summary of the procedural history and facts set forth by the majority of the Ninth Circuit Court of Appeals below in *Krainski v. NSHE et al.*, 616 F.3d 963, 965-967 (9th Cir. 2010).

Misstatements of in Petition

Respondents do, pursuant to Rule 15.2, point out misstatements of fact or law in the Petition that bear on what issues would be before the Court if certiorari were granted.

Contrary to Petitioner's assertion, the District Court provided a detailed analysis and explanation of its decision at the time of the hearing on Respondent's Motion to Dismiss. (RA, 70b-73b). Moreover, during the hearing Petitioner asked the Court to reconsider its position on the Fourth Amendment claim and substantive due process claim. (RA, 75b). Lastly, Petitioner failed to raise the request for leave to amend at all during the hearing (RA, 68b-79b) or following the hearing via a motion for reconsideration. The District Court's Order of October 20, 2008, simply memorialized the analysis provided to the parties during the hearing on the Motion to Dismiss. (Petitioner's Appendix, 23-27).

Petitioner's request to amend, included in her Opposition to Defendants' Motion to Dismiss, was not

clearly stated or sufficiently supported and failed to comply with the local rules[1] requiring the moving party to attach the proposed amended pleading to any motion. (Respondents' Appendix, hereinafter "RA," 66b-67b). Petitioner's request was a "naked" request made in passing without any support. *Id.* Other than including the passing reference in her Opposition, Petitioner failed to provide the District Court with notice of the basis for the request, including any statements whatsoever regarding what the proposed amendment might look like. *Id.*

Petitioner's misrepresents the allegations Petitioner pled in her own Complaint. Contrary to Petitioner's assertion, she did not plead "continuous and unyielding harassment and threats made by Polee to Krainski." (Petition, p.8). Petitioner actually pled that she met with the University employee, Respondent Leslie Wallenfeldt, and advised her of "on-going harassing and threatening behavior by [Petitioner's] roommate." *Krainski v. Polee*, 616 F.3d at 966. In several places within the Petition she asserts allegations that never appeared in her Complaint or on appeal before the Ninth Circuit. It is only now, in the Petition, that Petitioner sets forth the following allegation, four separate times: "and that no physical evidence of an attack existed whatsoever." (Pet. p.9; pp.12-13; p.14).

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[1] Local Rule 15-1(a):
Unless otherwise permitted by the court, the moving party shall attach the proposed amended pleading to any motion to amend so that it will be complete in itself without reference to the superseding pleading. An amended pleading shall include copies of all exhibits referred to in such pleading.

Missing from the Petition is an accurate summary of the criminal proceedings. Petitioner was arrested for the crime of Assault with a Deadly Weapon. *Krainski*, 616 F.3d at 966. Petitioner subsequently entered into a plea deal, which involved a submittal on the record wherein Petitioner pled guilty to a reduced crime of misdemeanor Disorderly Conduct, which would be dismissed upon her completion of impulse control counseling. (RA, 72b).

Misstatements of Law in Petition

The decision of the Ninth Circuit panel is in accord with governing legal principles set by this Court regarding qualified immunity and the standard of review on a motion to dismiss. *See* Argument, Section III, A, below. The decision of the Ninth Circuit corresponds with *Bell Atl. Corp. v. Twombly* and *Ashcroft v. Iqbal*, holding that threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice to overcome a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007); *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

II.

THE OPINIONS BELOW

The District Court granted Respondents' Motion to Dismiss. The Eleventh Amendment immunity barred Petitioner's constitutional claims against UNLV and the UNLV Employees in their official capacities. *Krainski*, 616 F.3d at 967-968. Qualified immunity barred Petitioner's federal claims against the UNLV

Employees in their individual capacities. The District Court also found Petitioner failed to make out federal claims for Fourteenth Amendment procedural due process, having alleged that she received some notice and hearing; substantive due process, having failed to allege a violation of a cognizable fundamental liberty or property interest; or violation of the Fourth Amendment relative to search and seizure, having pled facts constituting probable cause to arrest her by the police officer defendants employed by the University. (Pet. App. 23-27). The District Court having dismissed Petitioner's federal claims, with prejudice, declined to exercise jurisdiction over the remaining state law claims and therefore dismissed such claims without prejudice to Petitioner's right to bring them in state court. *Id.*

The Ninth Circuit Court of Appeals panel affirmed the District Court's dismissal of Petitioner's constitutional claims against UNLV and UNLV Employees in their official capacities. *Krainski*, 616 F.3d at 967-968. The Ninth Circuit panel further affirmed the District Court's dismissal of Petitioner's theory under *Monell v. Dep't of Social Servs. of N.Y.*,[2] that her constitutional rights were infringed by a "de facto policy" of UNLV and the UNLV Employees in accordance with this Court's express decline to extend *Monell's* theory of municipal liability under § 1983 to state entities or state officials. *Id.* at 968 (citations omitted).

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[2] 436 U.S. 658, 690 n.55, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

A majority of the Ninth Circuit panel affirmed the District Court's dismissal of Petitioner's Fourth Amendment claim against Respondents because Respondent police officers were entitled to qualified immunity in that, "'a reasonable police officer could have believed that his or her conduct was lawful' when arresting a suspect following a report from two University employees and the student alleging an attack." *Id.* at 969.

There was a two to one decision, with a Justice dissenting, in part, with regards to dismissal of Petitioner's Fourth Amendment claim. The dissenting Justice indicated the conclusory allegations made by Petitioner in her Complaint: that the UNLV police officers knew or should have known, that the allegations [against Petitioner] were false, were sufficiently pled. (Pet. App. 18). Respectfully, the dissent misapplied the principles enunciated by this Court in *Bell Atl. Corp. v. Twombly*, and *Ashcroft v. Iqbal*, which are addressed below. The Justice further dissented, in part, with regards to the issue of leave to amend, which Petitioner failed to properly place before the District Court, but which even if considered, failed to set forth any factual basis whatsoever to support a leave to amend, and for which Petitioner actually did not ever set forth any new facts that she could include in her Complaint to avoid its shortcomings.

The Ninth Circuit affirmed the District Court's dismissal of Petitioner's substantive and procedural due process claims based upon qualified immunity as the contours of the right asserted by Petitioner were not sufficiently clear that a reasonable person would understand that what he or she is doing violates that

right. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 821, 172 L. Ed. 2d 565 (2009).

Lastly, the Ninth Circuit majority affirmed the District Court's decision to dismiss the federal claims with prejudice and denial of leave to amend Petitioner's Complaint. Frankly, Petitioner's Complaint failed to contain sufficient factual matter to state a facially plausible claim to relief. *Ashcroft v. Iqbal*, 129 S. Ct. at 1949. No new facts were presented to the District Court by Petitioner that she could include in her complaint to overcome its shortcomings. Even at the late stage of oral argument before the Ninth Circuit the best Petitioner could come up with was more conclusory allegations.[3] Even considering those conclusory allegations, they did not constitute facts under this Court's enunciated standards, which properly led to the affirming of the District Court's denial of leave to amend.

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[3] We are certainly aware of many more facts now than we were when we first drafted the complaint. So essentially, the allegations we could add to the complaint at this point is to be more specific about the actual conspiracy that took place, who it occurred between, what school officials were actually involved with this.

Krainski, 616 F.3d 963 at 973.

III.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT'S DECISION TO DISMISS PETITIONER'S COMPLAINT BASED UPON *BELL ATL. CORP. V. TROWMBLY AND ASHCROFT V. IQBAL*, AS WELL AS PRINCIPLES OF QUALIFIED IMMUNITY, WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

Petitioner seeks review of his case by writ of certiorari, arguing that the court of appeals' decision regarding dismissal of her Fourth Amendment claim, and denial of leave to amend, was contrary to federal law. Petitioner asserts that a higher pleading standard was required for her claims and that she should have been granted leave to amend despite having set forth no factual support for such leave to amend. (Pet. 11-14 and 15-18).

The petition should be denied, however, because the questions Petitioner presents are not accurately reflective of the decision below. Rather, both the district court and court of appeals correctly concluded that Respondents were entitled to qualified immunity as to Petitioner's Fourth Amendment claim. (Pet. App. 10-11 and 26-27). The court of appeals included in its opinion discussion of the issue of leave to amend that Petitioner failed to set forth sufficient factual matter to state a facially plausible claim to relief, because she presented no new facts to overcome the shortcomings of the Complaint.

A. The Ninth Circuit Court of Appeals Majority Correctly Applied Governing U.S. Supreme Court Pleading Standards

The Ninth Circuit did not establish a heightened pleading standard for Section 1983 cases. Rather, the Ninth Circuit simply correctly applied the principles set forth by this Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544.

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although the "short and plain statement" requirement "does not require 'detailed factual allegations,'...it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949. "A pleading that offers 'labels and conclusions,' or a 'formulaic recitation of the elements of a cause of action will not do.'... Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949 (*citing Twombly*, 550 U.S. at 557)).

Frankly, Petitioner alleged, at best, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, which do not suffice. *Iqbal*, 129 S. Ct. at 1950. Petitioner's Complaint alleged Respondent UNLV police Officers Goff, Tramposch and Culver violated her Fourth Amendment right to be free from warrantless arrest absent probable cause. Petitioner failed to allege facts that supported her legal contentions that her arrest lacked probable cause. Petitioner failed to allege facts that supported her legal contention that the police officers "knew or should have known the allegations

made by victim Polee" were false. Petitioner failed to allege facts to suggest UNLV police officers had any reason to disbelieve the statements made by the victim and the two University employees that Petitioner attacked Polee with scissors. Petitioner pled:

> 28. Defendants Wallenfeldt, Pini and Polee then contacted UNLV Police and made false statements to police officer (sic) in an attempt to have Plaintiff arrested.
>
> 29/49. Defendant Officers Goff, Tramposch and Culver, knew, or should have known, that the allegations made by Defendant Polee were false, but arrested Plaintiff for the alleged crime of Assault with a Deadly Weapon;
>
> 30/50. Prior to making the arrest, Defendant Officers Goff, Tramposch, and Culver did not conduct any investigation into the claims made by Defendant Polee, and had no probable cause or warrant to arrest Plaintiff.

(Pet. App. 4). The tenet that a court must accept as true all of the allegations contained in a complaint is **inapplicable to legal conclusions**. *Iqbal*, 129 S. Ct. at 1949 (emphasis added). The Court is not bound to accept as true a legal conclusion couched as a factual allegation. *Id.* While legal conclusions can provide a framework of a complaint, they must be supported by factual allegations. *Id.* Petitioner's bare assertions amounted to nothing more than a "formulaic recitation of the elements," for a Fourth Amendment claim and conclusory allegations are not entitled to be assumed true. *Id.* at 1951.

Because the arresting officers are protected by qualified immunity, and because Petitioner did not allege facts that showed a clear violation of the Fourth Amendment, Petitioner's claim of Fourth Amendment violation was properly dismissed. Pursuant to *Twombly* and *Iqbal*, the Court is to consider the factual allegations in Petitioner's complaint to determine if they plausibly suggest an entitlement to relief. Here, Petitioner's Complaint alleges "Defendants Wallenfeldt, Pini and Polee contacted UNLV Police and made false statements to the police officer (sic) in an attempt to have Plaintiff arrested." (Pet. App. 4). Even assuming the few well pleaded facts gave rise to a plausible inference that UNLV Police Officers lacked probable cause, it is not necessary to reach whether or not probable cause was lacking because assuming the police officers were mistaken, there is no law that would have made it clear to a reasonable officer in these officers' position that their assessment of probable cause violated Petitioner's constitutional rights. Thus, under the standards of *Twombly* and *Iqbal*, Petitioner, failed to allege more by way of factual content to "nudg[e]" her claim of Fourth Amendment violation "across the line from conceivable to plausible." *Id.* at 1952. Moreover, the police officers would still be entitled to qualified immunity based on their objectively reasonable, albeit mistaken, belief that there was probable case. *Hunter v. Bryant*, 502 U.S. 224, 227-29, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam).

B. The Ninth Circuit Court of Appeals Majority Correctly Applied Governing U.S. Supreme Court Qualified Immunity Principles

UNLV police officers, arrested Petitioner, a suspect, following a report from Polee, the student alleging attack, and two UNLV employees indicating that Plaintiff had attacked Polee with a pair of scissors. The UNLV police officers were properly entitled to qualified immunity from 42 U.S.C. 1983 suit, because taken in light most favorable to Petitioner, the facts alleged demonstrated a reasonable police officer could have reasonably believed the arrest was lawful. The doctrine of qualified immunity protects government officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

Because qualified immunity is "an immunity from suit rather than mere defense to liability," this Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). *Harlow*, 457 U.S. at 818; *Pearson v. Callahan*, 129 S. Ct. 808, 815.

Determining whether officials are owed qualified immunity involves two inquiries: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201,

121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled by Pearson v. Callahan*, 129 S. Ct. at 818 (holding it is within a Court's sound discretion to address these two prongs in any sequence they see fit). "For a constitutional right to be clearly established, 'its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right' at the time of his conduct." *Anderson v. Creighton*, 438 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

UNLV police officers are entitled to immunity if a reasonable officer could have believed probable cause existed to arrest Petitioner. Probable cause existed if "at the moment the arrest was made, the officers had probable cause to make it – whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142 (1964); *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959).

No constitutional violation occurred in this case because the police officers arrested Petitioner based on information from three people. Petitioner admittedly pled that UNLV police officers Goff, Tramposch, and Culver arrested Petitioner based upon information derived from statements of the student who reported the attack, Polee, and two University officials, Tyree Pini and Leslie Wallenfeldt that Petitioner had attacked Polee with a pair of scissors. (Pet. App. 4). Petitioner included bare allegations in her Complaint

that the officers "knew or should have known, that the allegations....were false" (Pet. App. 4) but failed to allege in either her complaint or at oral argument before the District Court or the Ninth Circuit any facts suggesting that the police officers had a reason to disbelieve or suspect that the statements made by the victim and the two other university employees were false.

Even assuming, *arguendo*, that the police officers erred in concluding that probable cause existed to arrest Petitioner, the police officers nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken. Qualified immunity shields UNLV police officers Goff, Tramposch and Culver from suit for damages if a reasonable officer could have believed [Petitioner Krainski's] arrest to be lawful, in light of clearly established law and the information the [arresting] officers possessed. *Hunter*, 502 U.S. at 227. "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to qualified immunity." *Id.*, *Pearson v. Callahan*, 129 S. Ct. at 815 ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'"). Accordingly, the UNLV police officers were properly entitled to qualified immunity as to Petitioner's Fourth Amendment claim.

C. The Ninth Circuit Court of Appeals Majority Correctly Determined Petitioner Failed to Set Forth New Facts Before the District Court, and for that matter, the Ninth Circuit, Which Petitioner Could Include in her Complaint to Overcome its Fatal Shortcomings

On the next to the last page of her Opposition to Defendants' Motion to Dismiss, Petitioner requested the following:

> In the unlikely event that this Court was to find any of Plaintiff's causes of action insufficient, leave to amend is graciously requested. Plaintiff strongly believes that this Court could 'conceive of facts' that would render his (sic) claims valid, if he (sic) were permitted to amend.

(RA, 66b-67b).

When a party files a **proper motion for leave to amend**, rule 15(a) further provides "leave shall be freely given when justice so requires (emphasis added)." Fed. R. Civ. P. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); *see generally* 6 Charles Alan Wright et al., Federal Practice and Procedure §§1473 & 1483 (3d ed. 2010). The liberal granting of motions for leave to amend reflects the basic policy that pleadings should enable a claim to be heard on its merits. *See Foman*, 371 U.S. at 181-82; 6 Wright et al., *supra* §1473 at 601-602. This policy is not limitless and must be balanced against Fed. R. Civ. P 7(b)(1) which governs the requirements for all motions and provides that any

motion must "be in writing . . . ; state with particularity the grounds for seeking the order . . . ; and state the relief sought." *See also* 5 Wright & Miller, *supra* § 1191 at 50-51 (3d ed. 2004). By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and ensuring that "the court can comprehend the basis of the motion and deal with it fairly." 5 Wright & Miller, *supra* § 1192 at 56; *see also id.* § 1191 at 50. The District Court has wide discretion to recognize a motion for leave to amend in the interest of a just, fair or early resolution of litigation. *See id.*, § 1194.

Many districts, including Nevada,[4] have local rules requiring the moving party to submit a copy of the amended pleading with the motion for leave. *See, e.g., Thomas v. R.I.*, 542 F.3d 944, 950, 71 Fed. R. Serv. 3d 944 (1st Cir. 2008) (discussing failure to comply with local rule); *United States ex. rel. Lee v. Fairview Health Sys.*, 413 F.3d 748, 750 (8th Cir. 2005) (noting plaintiff's failure to comply with local rule requiring submission of copy of amended complaint); *Lemmons v. Georgetown Univ. Hosp.*, 241 F.R.D. 15, 30, 100 Fair Empl. Prac. Cas. (BNA) 563, 89 Empl. Prac. Dec. (CCH) P 42,777 (D.D.C. 2007) (local rule requires submission of proposed amendment); *Romero v. Wilson Elementary Sch. Distr. No. 7*, No. CV 05-2231-PHX-MHM, 2006 U.S. Dist. LEXIS 57652, 3-4, 2006 WL 2374844, 2 (D. Ariz. Aug. 15, 2006) (noting local rule requiring parties to file a notice identifying the differences between the original and amended pleadings and submit a "strike-through" version of the

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[4] *See footnote 1, supra.*

proposed amendment); *United States v. 3 Parcels in La Plata Cnty.*, 919 F. Supp. 1449, 1457, 1995 U.S. Dist. LEXIS 20664, 22 (D. Nev. 1999) (No proposed amended pleadings accompanied the party's motion. That failure alone required the court to deny the party's motion to amend his claim and answer).

The court of appeals properly affirmed denial of Petitioner's request for leave to amend because the Complaint lacked sufficient factual matter to state a facially plausible claim to relief, and no new facts were ever presented by Petitioner to demonstrate she could remedy the Complaint's shortcomings. Petitioner mentioned a request for leave to amend on the next to the last page of her Opposition to the Defendants' Motion to Dismiss. (RA, 66b-67b). The request for leave to amend was not clearly stated nor sufficiently supported and failed to comply with the local rules requiring the moving party to attach the proposed amended pleading to any motion. Instead, Petitioner's request was a "naked" request made in passing without any support. Other than including the passing reference in her Opposition, Petitioner failed to provide the District Court with notice of the basis for the request, including any statements whatsoever regarding what the proposed amendment might look like. District Courts are surely not required to engage in independent research or read the minds of litigants to determine if information justifying an amendment exists.

Petitioner's request lacked a statement for the grounds for amendment and dangled at the end of her Opposition to the Defendants' Motion to Dismiss and simply did not rise to the level of a motion for leave to amend. Because the motion for leave to amend was

never properly before it, the District Court did not abuse its discretion is failing to address Petitioner's request for leave to amend.

Moreover, even if the Court overlooked this procedural defect, the District Court's decision to grant the motion to dismiss was sound. At the actual hearing (October 14, 2008) before the District Court on the Defendants' Motion to Dismiss, Petitioner did not suggest that she wanted to amend her complaint to add facts to the Fourth Amendment claim. (RA, 74b-75b). On appeal, before the Ninth Circuit, Petitioner stated at oral argument (December 3, 2009):

> We are certainly **aware of many more facts now** than we were when we first drafted the complaint. So essentially, the allegations we could add to the complaint at this point is to be more specific about the actual conspiracy that took place, who it occurred between, what school officials were actually involved.

(Pet. App. 21).

However, Petitioner did not state she was aware of "facts" at the time of the District Court hearing or that she brought these "facts" forth to the District Court's attention. More importantly, and fatally, at oral argument before the Ninth Circuit, Petitioner failed to specify what "facts" she claimed to have.

Petitioner failed to raise the issue of amendment during the hearing before the District Court. Petitioner certainly had an opportunity to present all of her arguments before the Court, and certainly did so. In fact, Petitioner even requested the District

Court reconsider its position of the Fourth Amendment and substantive due process claims. (RA, 75b-76b). The District Court listened to Petitioner's arguments and in view of the dialogue, did in fact reconsider but was not moved by Petitioner's argument. *Id.* Significantly, Petitioner failed to raise the issue of amendment during the hearing. (RA, 68b-79b).

Instead, Petitioner essentially demands that the District Court should have *sua sponte* raised the leave to amend issue when she failed to follow the rules, failed to raise it during oral argument on the Defendants' Motion to Dismiss; and failed to bring it properly before the Court. Assuming Petitioner had made the claim to the District Court, as she boldly made before the Ninth Circuit, **there are simply no facts pled** (emphasis added). To survive a motion dismiss, a complaint must contain sufficient factual matter to state a facially plausible claim to relief. *Iqbal*, 129 S. Ct. at 1949. Although the "short and plain statement" of Rule 8 does not require "'detailed factual allegations,'...it demands more than an unadorned, the defendant-harmed-me accusation." *Id.* No new facts were ever actually presented by Petitioner to overcome any of the shortcomings of the Complaint.

IV.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents
State of Nevada ex. rel. Board of Regents of the Nevada System of Higher Education on behalf of the University of Nevada, Las Vegas; Rebecca Mills; Richard Clark; Phillip Burns; Nannette Jimenez; Tyree Pini; Officer L. Tramposch; Officer B. Gott; Officer J. Culver; Susan M. Carrasco; and Leslie Wallenfeldt

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Complaint, United States District, District of Nevada (April 2, 2008) 1b

Appendix B: Opposition to Defendants Motion to Dismiss Plaintiff's Complaint, United States District Court, District of Nevada (July 11, 2008) 23b

Appendix C: Reporter's Transcript of Proceedings, United States District Court, District of Nevada, The Honorable James C. Mahan, Judge Presiding (October 14, 2008) 68b

APPENDIX A

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
* * * * *

CASE:

[Filed April 2, 2008]

MEGAN KRAINSKI,

Plaintiff,

v.

THE STATE OF NEVADA. ex. Rel. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of the UNIVERSITY OF NEVADA, LAS VEGAS; a Political Subdivision of the State of Nevada; REBECCA MILLS, individually and as Vice President for Student Life of the University of Nevada, Las Vegas; RICHARD CLARK,

individually and as Director of Student Conduct and Residential Life of the University of Nevada, Las Vegas; PHILLIP BURNS, individually and as Senior Student Conduct Officer of the University of Nevada, Las Vegas; NANNETTE JIMENEZ, individually and as a Student Conduct Officer of the University of Nevada, Las Vegas; SUSAN M. CARRASCO, individually and as Assistant General Counsel of the University of Nevada, Las Vegas; TYREE PINI, individually and as Assistant Residential Life Coordinator; LESLIE WALLENFELDT, individually and as Residential Life Coordinator of the University of Nevada, Las Vegas; OFFICER BRETT GOFF, P#302, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER L. TRAMPOSCH, P#312, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER J. CULVER, P#309, individually and as a police officer with the University of Nevada, Las Vegas Police Department; KENYA POLEE, individually; DOES I-XX, inclusive,

Defendants.

COMPLAINT
(Jury Demanded)

COMES NOW, Plaintiff, MEGAN KRAINSKI (hereinafter referred to as "Plaintiff"), by and through her attorney of record, JASON J. BACH, ESQ. of THE BACH LAW FIRM, LLC, and hereby complains and

alleges against the above-named Defendants, and each of them, based upon knowledge, information and a reasonable belief derived therefrom, as follows:

INTRODUCTION

This is a Complaint for Damages and Declaratory Judgment, pursuant to Fed. R. Civ. P. 57, brought by a student of the University of Nevada, Las Vegas. The claims, against the University System, the University, the Vice President, Attorneys, Employees and Officers of this public university, are based upon 42 U.S.C. Section 1983 and the Fourth, Fifth, and Fourteenth Amendment of the United States Constitution, alleging infringement of Plaintiff's right to substantive and procedural due process, and right to be free of false arrest and imprisonment, and malicious prosecution. Plaintiff also relies on the University's Student Conduct Code and alleges a pendent breach of contract claim. Plaintiff has also asserted a claim against all Defendants for negligent hiring, training, and supervision, intentional and negligent infliction of emotional distress, civil conspiracy, abuse of process, defamation, slander, libel, and injunctive and declaratory relief.

PARTIES & JURISDICTION

1. This Court has jurisdiction over the claims set forth in this action pursuant to 28 U.S.C. Section 1331 (federal question) and 28 U.S.C. Section 1343 (civil rights).

2. Supplemental jurisdiction over Plaintiff's pendent state law claims is invoked pursuant to 28 U.S.C. Section 1367, as the claim arises out of the

same transaction and occurrence as Plaintiff's federal claim.

3. Venue is proper in the District of Nevada pursuant to 28 U.S.C. 1391(b) in that the claims arose in this district, and Plaintiffs and Defendants are located in this district.

4. Costs, expert witness fees, and attorney's fees are sought pursuant to 42 U.S.C. Section 1988.

5. Plaintiff is currently a resident of the State of Nevada, and at all relevant times, was a student at the University of Nevada, Las Vegas.

6. Defendant THE STATE OF NEVADA, ex. Rel. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of the UNIVERSITY OF NEVADA, LAS VEGAS is a political subdivision of the State of Nevada and operates the University of Nevada, Las Vegas (hereinafter referred to as "UNLV"), a public educational institution of higher learning.

7. Defendant REBECCA MILLS is the Vice President for Student Life at UNLV. She is named in this case both individually and in her official capacity as Vice President for Student Life at UNLV.

8. Defendant RICHARD CLARK is the Director of Student Conduct and Residential Life at UNLV. He is named in this case both individually and in his official capacity as Director of Student Conduct and Residential Life at UNLV.

9. Defendant PHILLIP BURNS is the Senior Student Conduct Officer at UNLV. He is named in this case both individually and in his official capacity as Senior Student Conduct Officer at UNLV.

10. Defendant NANNETTE JIMENEZ is a Student Conduct Officer at UNLV. She is named in this case both individually and in her official capacity as a Student Conduct Officer at UNLV.

11. Defendant SUSAN M. CARRASCO is the Assistant General Counsel at UNLV. She is named in this case both individually and in her official capacity as Assistant General Counsel at UNLV.

12. Defendant TYREE PINI is the Assistant Residential Life Coordinator at UNLV. He is named in this case both individually and in his official capacity as Assistant Residential Life Coordinator at UNLV.

13. Defendant LESLIE WALLENFELDT is the Residential Life Coordinator at UNLV. She is named in this case both individually and in her official capacity as Residential Life Coordinator at UNLV.

14. Defendant OFFICER BRETT GOFF P#302 is a police officer with the UNLV Police Department. He is named in this case both individually and in his official capacity as a police officer at UNLV.

15. Defendant OFFICER L. TRAMPOSCH P#312 is a police officer with the UNLV Police Department. He is named in this case both individually and in his official capacity as a police officer at UNLV.

16. Defendant OFFICER J. CULVER P#309 is a police officer with the UNLV Police Department. He is named in this case both individually and in his official capacity as a police officer at UNLV.

17. Defendant KENYA POLEE is, at all times relevant, believed to be a resident of the State of Nevada.

18. That the true names or capacities, whether individual, corporate, associate or otherwise, of Defendants DOES I through XX are unknown to Plaintiff, who therefore, sues said Defendants by such fictitious names.

19. Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as DOES are responsible in some manner for the events and happenings referred to in this action and proximately caused damages to Plaintiff as herein alleged, and that Plaintiff will ask leave of this Court to amend this Complaint, to insert the true names and capacities of said Defendants, and when the same have been ascertained to join such Defendants in this action.

20. At all times herein, the individual Defendants, with the exception of Defendant POLEE and the Defendant UNLV, have been acting under color of law.

21. At all times relevant hereto, and in all their actions described herein, Defendants' actions took place in the State of Nevada, County of Clark.

22. Defendants, and each of them, did the acts and omissions hereinafter alleged in bad faith and with knowledge that their conduct violated well established and settled law.

GENERAL FACTUAL ALLEGATIONS

23. Plaintiff enrolled as a student at UNLV for the Fall 2007 semester.

24. As Plaintiff was from New Jersey, she elected to reside in Defendant UNLV's campus residential housing.

25. On September 10, 2007, Plaintiff met with Defendant WALLENFELDT and advised her of on-going harassing and threatening behavior by Plaintiff's roommate, Defendant POLEE.

26. Defendant POLEE is a prominent student-athlete at UNLV, listed on the University's website as "the top long jumper for the Rebels... among the top long jumpers in the MWC (Mountain West Conference)."

27. On September 11, 2007, Defendants WALLENFELDT and PINI contacted Defendant POLEE, without Plaintiff's consent and in breach of confidentiality, and informed her of the allegations made by Plaintiff, and conspired with Defendant POLEE to fabricate a story about Plaintiff attempting to attack POLEE with a pair of scissors, all before Plaintiff would have an opportunity to file a formal complaint against Defendant POLEE.

28. Defendants WALLENFELDT, PINI, and POLEE then contacted UNLV Police and made false statements to police officer in an attempt to have Plaintiff arrested.

29. Defendant Officers GOFF, TRAMPOSCH, and CULVER, knew, or should have known, that the allegations made by Defendant POLEE were false, but arrested Plaintiff for the alleged crime of Assault with a Deadly Weapon.

30. Prior to making the arrest, Defendant Officers GOFF, TRAMPOSCH, and CULVER did not conduct any investigation into the claims made by Defendant POLEE, and had no probable cause or warrant to arrest Plaintiff.

31. Plaintiff was eventually exonerated of all criminal charges in January 2008, but not before she was arrested and incarcerated at the Clark County Detention Center, causing her to lose her liberty and causing severe psychological trauma and physical injury.

32. In October 2007, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO brought formal charges against Plaintiff for alleged violations of the University of Nevada, Las Vegas Student Conduct Code, including committing an act "that is in violation of federal, state, or local law," "Threatening, assaulting, or causing physical harm to. . . another;" and "Attempting to violate any provision of the Student Conduct Code."

33. Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO failed to provide

Plaintiff with proper notice of the formal hearing, violating her U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.

34. Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO held a formal hearing on November 13, 2007, at which time they each failed to allow Plaintiff to be represented and/or assisted by her advisors, despite the explicit representation made by Defendants that Plaintiff would be allowed to be represented and/or assisted by said advisors, intentionally causing Plaintiff to be ineffective at representing herself at said hearing, all in violation of her U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.

35. Despite the fact that no evidence was ever presented to support any of the allegations made against Plaintiff, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO found Plaintiff to be "Responsible" of said charges, completely ignoring the evidence that exonerated Plaintiff, forever tarnishing the educational transcript and record of Plaintiff, as well as causing severe psychological and physical injuries, all in violation of her U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.

36. Plaintiff filed a timely appeal of Defendants decision. However, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO again ignored the facts and dismissed the appeal, all in violation of her U.S. Constitutional Rights, the UNLV

Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.

37. Defendants have taken said actions against Plaintiff in retaliation for her making a complaint against a star athlete, and further retaliating against her for asserting her rights pursuant to the U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.

38. As a result of the above, Defendants, and each of them, have wrongly caused Plaintiff to be sanctioned and for the above-noted sanctions to be wrongly placed on her record, all in violation of her U.S. Constitutional Rights, depriving her of the opportunity to obtain an education and further her career, and inflicting emotional distress and physical injury, all damaging her in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

FIRST CAUSE OF ACTION

CIVIL RIGHTS VIOLATION, DUE PROCESS VIOLATION, FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

39. Paragraphs 1 through 38, inclusive are incorporated by reference.

40. The actions of Defendants resulted from, and were taken, pursuant to a *de facto* policy of Defendant UNLV, which is implemented by Police Officers, Student Conduct Officers, Assistant General Counsels,

Directors of Student Conduct, and by the Vice President for Student Life, and other employees of the said Defendants, all acting under the color of law, who chose to violate Plaintiff's constitutional rights, without rightful authority of law.

41. Supervisory and policy making officers and officials of said Defendants have known the existence of the *de facto* policy described above for a substantial period of time.

42. Despite their knowledge of the said illegal policy and practices, supervisory and policy-making officers and officials of the said Defendants have not taken steps to determine said practices, have not disciplined or otherwise properly supervised the individual employees who engaged in the said practices, have not effectively trained Police Officers, Student Conduct Officers, Directors of Student Conduct, and the Vice President for Student Life with regard to the proper constitutional and statutory limits on the exercise of their authority, and have instead sanctioned the policy and the practices described herein.

43. That the above actions by Defendants have resulted in both the substantive and procedural due process denial of rights, all in violation of the Fifth and Fourteenth Amendment to the United States Constitution.

44. That by reason of the aforesaid actions, Defendants' actions exhibit deliberate indifference to and/or reckless disregard for the constitutional rights of Plaintiff and other similarly situated students, all in violation of the Plaintiff's constitutional rights, and as

a direct and proximate result thereof, the Plaintiff sustained severe damages in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

45. That by reason of the aforesaid actions, Plaintiff is entitled to a Permanent Injunction, prohibiting the Defendants and their agents from placing a hold on her academic transcript or placing any notation of findings or sanctions against her in her student file or upon her transcript.

46. The acts, conduct and behavior of each of the Individual Defendant's was performed knowingly, intentionally, oppressively, and maliciously, by reason of which Plaintiff is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

47. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

SECOND CAUSE OF ACTION

UNLAWFUL ARREST AND IMPRISONMENT, UNLAWFUL SEARCH AND SEIZURE, FOURTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

48. Paragraphs 1 through 47, inclusive are incorporated by reference.

49. Defendant Officers GOFF, TRAMPOSCH, and CULVER, knew, or should have known, that the

allegations made by Defendant POLEE were false, but arrested Plaintiff for the alleged crime of Assault with a Deadly Weapon.

50. Prior to making the arrest, Defendant Officers GOFF, TRAMPOSCII, and CULVER did not conduct any investigation into the claims made by Defendant POLEE, and had no probable cause or warrant to arrest Plaintiff.

51. Plaintiff was eventually exonerated of all criminal charges in January 2008, but not before she was arrested and incarcerated at the Clark County Detention Center, causing her to lose her liberty and causing severe psychological trauma and physical injury.

52. The arrest, imprisonment, search and seizure described above was unreasonable and in violation of the Fourth Amendment of the United States Constitution. As a result of these acts, Plaintiff has suffered physical injuries, loss of community reputation, loss of day and future income, and to incur severe financial obligations in order to retain attorneys to seek redress against the unlawful conduct of the Defendants, as well as other painful injuries, deprivation of her liberty, invasion or her privacy, grievous mental suffering, and pain and suffering, all in violation of 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments to the United States Constitution, all to her damage in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

53. The act, conduct and behavior of Defendant Officer's, individually, were performed knowingly and intentionally, oppressively and maliciously, by reason of which Plaintiff is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

54. That by reason of the aforesaid actions, Defendants' actions exhibit deliberate indifference to and/or reckless disregard for the constitutional rights of Plaintiff and other similarly situated students, all in violation of the Plaintiff's constitutional rights, and as a direct and proximate result thereof, the Plaintiff sustained severe damages in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

55. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

THIRD CAUSE OF ACTION

BREACH OF CONTRACT

56. Paragraphs 1 through 55, inclusive are incorporated by reference.

57. Plaintiff has an express and implied contract with Defendants in connection with rights explicitly guaranteed by UNLV pursuant to the UNLV Student Conduct Code, NSHE Code, and the UNLV Student Handbook.

58. The actions of Defendants constitute a breach of the express and implied contract.

59. As a result of the breach committed against the Plaintiff, she has been damaged in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

60. That by reason of the aforesaid actions, Plaintiff is entitled to a Permanent injunction prohibiting the Defendants and their agents from placing a hold on her academic transcript, or placing any notation of any findings or sanctions against her in Plaintiff's student file or upon her transcript.

61. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action, and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

FOURTH CAUSE OF ACTION

NEGLIGENCE / NEGLIGENT HIRING, TRAINING, & SUPERVISION

62. Paragraphs 1 through 61, inclusive, are incorporated by reference.

63. At all times material and relevant herein, the Defendants had a duty to not violate the Constitutional rights of their students.

64. At all times relevant herein, Defendant UNLV had a duty not to hire individuals with a propensity towards committing unlawful acts against those who lawfully go about their business, and to

adequately train and supervise their agents, officers, and employees.

65. At all times relevant herein, the Defendant UNLV had a duty to protect the public, such as Plaintiff, from the illegal actions of their own agents, officers, employees and others. In addition, Defendant UNLV had a duty not to hire individuals with a propensity towards committing unlawful acts against the public, and to adequately train and supervise their employees.

66. Defendants, and each of them, breached their respective duties, and are therefore negligent and liable to the Plaintiff, who has suffered serious economic loss, loss of reputation, loss of daily and future income, and to incur severe financial obligations in order to retain attorneys, as well as other painful injuries, deprivation of his liberty, invasion of his privacy, grievous mental suffering, all to her damage in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

67. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action, and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

FIFTH CAUSE OF ACTION

INTENTIONAL AND NEGLIGENT INFLICTION OF SEVERE MENTAL DISTRESS

68. Paragraphs 1 through 67, inclusive, are incorporated by reference.

69. As a result of Defendants' intentional and negligent conduct and omissions, Plaintiff, suffered and continues to suffer great mental and emotional harm, anguish, insecurity, self-revulsion, damage to her self-esteem, and self-worth, shame and humiliation, including but not limited to: severe and clinical depression, anxiety, loss of sleep, and change of appetite.

70. Plaintiff has required medical and psychological care as result of the malfeasance and nonfeasance of Defendants. This has caused Plaintiff to incur expenses for medical care, treatment, and expenses incidental thereto. The total amount of Plaintiff's damages cannot yet be fully ascertained, and as such we respectfully ask leave of this Court to amend Plaintiff's Complaint to insert the full amount when such have been fully ascertained.

71. As a result of the mental distress described above, Plaintiff has suffered serious psychological injury, loss of community reputation, medical expenses, and to incur severe financial obligations in order to retain attorneys to seek redress against the unlawful conduct of the Defendants, as well as deprivation of his liberty, invasion of his privacy, and grievous mental suffering, all to damages in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

72. The acts, conduct and behavior of the Defendants were performed willfully, intentionally, oppressively, fraudulently and maliciously, by reason of which Plaintiff, is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

73. It has been necessary for Plaintiff to obtain the services of an attorney to prosecute this action, and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

SIXTH CAUSE OF ACTION

INJUNCTIVE DECLARATORY RELIEF

74. Paragraphs 1 through 73 inclusive are incorporated by reference.

75. Defendant actions of placing a hold on her academic transcript, and the placing of notations of any accusations, findings, or sanctions against her, in Plaintiff's student file or upon her transcript, is unjust and illegal.

76. The harm caused by Defendant is irreparable and can only be mitigated by the release of the above transcripts and omission of any notations. For that reason, Plaintiff is entitled to an order requiring Defendants to immediately release any holds on her transcript, remove any notations of any disciplinary accusations, findings or sanctions, and prohibiting Defendants from further interfering with Plaintiff's educational future.

77. As a result of the acts committed against Plaintiff, she has been damaged all in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

78. As a result of Defendants' intentional conduct, they have caused Plaintiff to incur attorney's fees in an amount in excess of SEVENTY-FIVE

THOUSAND DOLLARS ($75.000.00) and thus Plaintiff is entitled to an award of attorney's fees.

SEVENTH CAUSE OF ACTION

CIVIL CONSPIRACY

79. Paragraphs 1 through 78 inclusive are incorporated by reference.

80. At all times herein referred to, Defendants conspired with each other to fraudulently take action against Plaintiff to make false allegations about Plaintiff, to have her arrested and charged with a crime, and to have her punished for student conduct code violations, all while knowing that Plaintiff had not performed any of the acts in which they accused her of.

81. As a result of the mental distress described above, Plaintiff has suffered serious psychological injury, loss of community reputation, medical expenses, and to incur severe financial obligations in order to retain attorneys to seek redress against the unlawful conduct of the Defendants, as well as deprivation of her liberty, invasion of her privacy, and grievous mental suffering, all to damages in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

82. The acts, conduct and behavior of the Defendants were performed willfully, intentionally, oppressively, fraudulently and maliciously, by reason of which, Plaintiff is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

83. It has been necessary for Plaintiff to obtain the services of an attorney to prosecute this action and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

EIGHTH CAUSE OF ACTION

DEFAMATION, LIBEL AND SLANDER PER SE

84. Paragraphs 1 through 83 inclusive are incorporated by reference.

85. That Defendants' conduct described above severely harmed the reputation and character of the Plaintiff with the making of false statements to third parties, both orally and in writing.

86. That Plaintiff has suffered loss of reputation, shame, mortification and hurt feelings as a result of Defendants deliberate, malicious, intentional, and oppressive conduct.

87. As a direct and proximate result of the false statements made by Defendants, Plaintiff has suffered injury and damages all in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

88. The acts, conduct and behavior of each of the individual Defendants were performed knowingly, intentionally, oppressively, and maliciously, by reason of which, Plaintiff is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

89. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action, and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

NINTH CAUSE OF ACTION

MALICIOUS PROSECUTION/ABUSE OF PROCESS

90. Paragraphs 1 through 89 inclusive are incorporated by reference.

91. The Defendants' conduct, described above, resulted in the prosecution of Plaintiff by the actions of the Defendants, without probable cause, with malice, requiring Plaintiff to unnecessarily defend herself to have said criminal charges dismissed, thus violating her U.S. Constitutional Rights and State law.

92. The Defendants' conduct, described above, resulted in Defendants utilizing the UNLV Student Conduct Code process as a vehicle to maliciously take action against Plaintiff, to jeopardize Plaintiff's educational future and career, and force her to defend herself in said process, in violation of her U.S. Constitutional Rights and State law..

93. As a direct and proximate result of the above described conduct by Defendants, Plaintiff has suffered injury and damages all in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

94. The acts, conduct and behavior of each of the Individual Defendant's was performed knowingly,

intentionally, oppressively, and maliciously, by reason of which, Plaintiff is entitled to punitive damages in a sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00).

95. It has been necessary for the Plaintiff to obtain the services of an attorney to prosecute this action, and Plaintiff is entitled to an award of attorney's fees and costs of suit incurred herein.

WHEREFORE, Plaintiff prays that this Honorable Court: Enter judgment in Plaintiff's favor, and against the Defendants, and each of them: (a) for compensatory damages in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00); (b) for punitive damages each in an amount in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00); (c) for injunctive and declaratory relief; and (d) together with the costs and disbursements of this action and such other attorney's fees pursuant to 42 U.S.C. § 1988, and further relief as justice requires.

DATED this 1st day of April, 2008.

THE BACH LAW FIRM, LLC

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APPENDIX B

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
* * * * *

CASE NO.: 2:08-cv-00417-JCM-GWF

[Filed July 11, 2008]

MEGAN KRAINSKI,

Plaintiff,

v.

THE STATE OF NEVADA. ex. Rel. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, on behalf of the UNIVERSITY OF NEVADA, LAS VEGAS; a Political Subdivision of the State of Nevada; REBECCA MILLS, individually and as Vice President for Student Life of the University of Nevada, Las Vegas; RICHARD CLARK,

individually and as Director of Student Conduct and Residential Life of the University of Nevada, Las Vegas; PHILLIP BURNS, individually and as Senior Student Conduct Officer of the University of Nevada, Las Vegas; NANNETTE JIMENEZ, individually and as a Student Conduct Officer of the University of Nevada, Las Vegas; SUSAN M. CARRASCO, individually and as Assistant General Counsel of the University of Nevada, Las Vegas; TYREE PINI, individually and as Assistant Residential Life Coordinator; LESLIE WALLENFELDT, individually and as Residential Life Coordinator of the University of Nevada, Las Vegas; OFFICER BRETT GOFF, P#302, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER L. TRAMPOSCH, P#312, individually and as a police officer with the University of Nevada, Las Vegas Police Department; OFFICER J. CULVER, P#309, individually and as a police officer with the University of Nevada, Las Vegas Police Department; KENYA POLEE, individually; DOES I-XX, inclusive,

Defendants.

OPPOSITION TO DEFENDANTS MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW, Plaintiff, MEGAN KRAINSKI (hereinafter referred to as "Plaintiff"), by and through her attorney of record, JASON J. BACH, ESQ. of THE BACH LAW FIRM, LLC, and hereby opposes

Defendants' Motion to Dismiss Plaintiff's Complaint, pursuant to FRCP 12(b)(6). Plaintiff's opposition is based on the foregoing Points and Authorities, Plaintiff's Complaint, all papers and pleadings on file herein, and any oral argument requested from the Court.

DATED this 10th day of July, 2008.

THE BACH LAW FIRM, LLC

By: */s/ Jason J. Bach*
JASON J. BACH, ESQ.
Nevada Bar No.: 7984
6053 South Fort Apache Rd., Suite 130
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Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I.

LEGAL ARGUMENT

A. STANDARD OF REVIEW PURSUANT TO FRCP 12(b)(1) AND 12(b)(6).

The Court's review of a 12(b) motion is based strictly on the contents of the Complaint. The Court must accept the allegations as true and construe them in the light most favorable to the Plaintiff. ***Abramson***, 897 F.2d at 391; ***Love v. United States***, 871 F.2d 1488 (9th Cir. 1989). In such a case, the court may accept all of the alleged facts, and all inferences from the alleged facts, as true.

Pursuant to Federal Rules of Civil Procedure 12(b)(1), a Court must dismiss an action, "if as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations'." ***Neitzske v. Williams***, 490 U.S. 109 (1989) quoting ***Hishon v. King & Spaulding***, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984); ***Abramson v. Brounstein***, 897 F.2d 389, 391 (9th Cir. 1990); ***Gibson v. United States***, 781 F.2d 1334 (9th Cir. 1986).

The Court's review of a 12(b)(6) motion is based on the contents of the Complaint. The Court must accept the allegations as true and construe them in the light most favorable to the Plaintiff. ***Abramson,*** 897 F.2d at 391; ***Love v. United States***, 871 F.2d 1488 (9th Cir. 1989).

From reviewing Plaintiff's Complaint, it is clear that allegations she sets forth arise to a level of various Constitutional violations, actionable under 42 U.S.C. § 1983 and Fourteenth Amendment to the United States Constitution. In describing the actions of Defendants', Plaintiff's Complaint reasonably infers that each government Defendant participated in the intentional denial of Plaintiff's right to due process. In addition, Plaintiff's Complaint establishes that money damages in excess of $75,000 were incurred as a result of Defendants' illegal conduct. For these reasons, Plaintiffs Complaint is viable and should not be dismissed.

B. ELEVENTH AMENDMENT IMMUNITY DOES NOT APPLY TO INDIVIDUAL DEFENDANTS OR THE ABILITY OF THIS COURT TO ENJOIN ALL DEFENDANTS.

State officials may be held personally liable for damages under § 1983 based upon actions taken in their official capacities. ***Hafer v. Melo***, 502 U.S. 21 (1991). It is incorrect for a district court to interpret ***Will v. Michigan Dept. of State Police***, 491 U.S. 58 (1989) to mean that § 1983 does not authorize suits against state officials for damages arising from official acts. ***Hafer*** at 23. State executive officials are not entitled to absolute immunity for their official actions. *Id.* at 29, *citing* ***Scheuer v. Rhodes***, 416 U.S. 232, 243 (1974). Even if state law requires the state to pay any damages awarded against a state official, a § 1983 action is not "against" the state for the purposes of the Eleventh Amendment immunity. ***Demery v. Kupperman***, 135 F.2d 1139 (9th Cir. 1984).

An action will *not* be deemed to be against the state, and thus barred by the Eleventh Amendment, where the plaintiff seeks to impose personal liability on state officials sued in their individual capacity as a result of actions undertaken by that official which violated plaintiff's federally protected rights. ***Bair v. Krug***, 853 F.2d 672 (9th Cir. 1988); ***Central Reserve Life of North America Ins. Co. v. Struve***, 852 F.2d 1158 (9th Cir. 1988).

Moreover, nearly 100 years ago the United States Supreme Court cleared the way for Plaintiff's, such as Mr. Lucey, to enforce their Constitutional Rights against state officials through injunctive relief. ***Ex parte Young***, 209 U.S. 123 (1908). The Court held

that injunctive relief may be obtained through the federal courts when state officials are accused of violating the Fourteenth Amendment:

> [T]he use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. . . . The officer. . . is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id., at 159-160.

In other words, even if a state is immune from injunctive relief, the federal courts can put an end to unconstitutional conduct by state officials, by enjoining those state officials in their individual capacity. *Id.*

However, the case relied upon by State Defendants' in their Motion, ***Seminole Tribe of Florida v. Florida,*** 517 U.S. 44 (1996), does *not* bar injunctive relief by a federal court, in a § 1983 case, against the actual State or officials in their official capacity. The limitations imposed on the federal courts by ***Seminole Tribe***, *only* apply against a state where Congress had prescribed a "detailed remedial scheme for the enforcement against a State of a statutorily created right. . .." ***Ellis v. University of Kansas Medical Center***, 163 F.3d 1186 (10th Cir. 1998), *citing* ***Seminole Tribe***, 517 U.S. at 74. However, ***Seminole Tribe*** does not limit the federal courts ability to enforce constitutional rights, such as Ms. Krainski's due process rights. *See*, ***Ellis***, 163 F.3d 1186. Additionally, § 1983 did not create a detailed remedial

scheme, or any substantive rights at all, but is simply a vehicle for bringing constitutional claims before the federal courts. *Id.* As such, UNLV is subject to the injunction powers of this court, as Plaintiff's claims are constitutional in nature, not statutory.

Plaintiff has the right to bring causes of action for money damages against the individual Defendants. ***Hafer v. Melo***. This court has every ability to enjoin *all* Defendants from continuing to violate Plaintiff's constitutional rights. It may be accomplished by an order to the State university, or by an order to the individual defendants in their individual capacity, pursuant to ***Ex parte Young***.

1. **THE ELEVENTH AMENDMENT DOES NOT BAR A FEDERAL SUIT AGAINST OFFICIAL CAPACITY DEFENDANTS, AS CONSTITUTIONAL VIOLATIONS ARE ON-GOING.**

The Ninth Circuit has held that the Eleventh Amendment does not bar federal suits against Nevada officials, in their official capacity, where the relief sought is prospective in nature and is based on an on-going violation of the plaintiff's *federal* constitutional or statutory rights. ***Central Reserve Life of North America Ins. Co. v. Struve***, 852 F.2d 1158 (9th Cir. 1988), *citing* ***Ex Parte Young***; ***Charley's Taxi Radio Dispatch Corp. v. Sida of Hawaii, Inc.***, 810 F.2d 869, 874 (9th Cir. 1987). That is certainly the case here. As alleged in Plaintiff's Complaint, Defendants' have made notations upon her transcripts of the unlawful disciplinary actions taken against Plaintiff. As such, Defendants continue to violate Plaintiff's Fourteenth Amendment Rights,

which gives this Court jurisdiction over Defendants in their *official* capacity, and Defendants are not entitled to Eleventh Amendment immunity in their official capacity. ***Central Reserve Life of North America Ins. Co. v. Struve***.

C. INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS THEY VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS.

A defendant is entitled to qualified immunity if the defendant did not violate "clearly established rights" at the time of the conduct in question. See, ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982). Defendants accurately point to the two-prong test established in ***Saucier v. Katz***, 533 U.S. 194 (2001).

The test for qualified immunity is objective. The defendant's actual purpose or state of mind is not material. Whether rights were "clearly established" at the relevant time is determined in most instances by looking at controlling published court decisions as of that time. See, ***United States v. Lanier***, 520 U.S.259, 269-71 (1997) (discussing qualified immunity in § 1983 and ***Bivens*** cases).

While the law in this matter is clearly established in favor of Plaintiffs, it is not necessary for a plaintiff to show a published decision establishing the rights in question under precisely the same circumstances as those presented in the case in question. Some conduct so clearly violates a person's rights that the question is unlikely to come before the courts for a decision. The Supreme Court has explained in the context of both fair warning for criminal law and qualified immunity

for civil rights defendants, that "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" ***United States v. Lanier***, 520 U.S. at 271, *quoting* ***Anderson v. Creighton***, 483 U.S. 635, 640 (1987). To rule that until the Supreme Court has spoken, no right of litigants in this circuit can be deemed established before we have decided the issue would discourage anyone from being the first to bring a damages suit in this court; he would be certain to be unable to obtain any damages. ***Burgess v. Lowery***, 201 F.3d 942, 85 A.L.R.5th 719 (7th Cir. 2000) (affirming denial of summary judgment based on qualified immunity).

In ***Capeoman v. Reed***, 754 F.2d 1512, 1514 (9th Cir.1985), the 9th Circuit interpreted the meaning of ***Harlow's*** "clearly established" rights standard. They concluded that in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits, and district courts to determine whether the right was clearly established. ***Ward v. County of San Diego***, 791 F.3d 1329, 1332 (9th Cir. 1986), *citing* ***Capeoman***. An additional factor is the likelihood that the Supreme Court or the Ninth Circuit would have reached the same result as courts that had already considered the issue. *Id.*, *citing* ***Capeoman*** at 1515.

Similarly, in ***Buonocore v. Harris***, the Fourth Circuit held that the Fourth Amendment prohibits government agents executing a valid search warrant from aiding a private individual carry out an

independent search of a home for items unrelated to those specified in the warrant. Affirming a denial of summary judgment based on qualified immunity, the court found that no opinion directly on point was needed to show that the alleged conduct violated clearly established rights. 65 F.3d 347, 356-57 (4th Cir.1995). The Fourth Circuit quoted another Seventh Circuit case on this issue: "the absence of [many] reported case[s] with similar facts demonstrates nothing more than wide-spread compliance with well-recognized constitutional principles." *Id.* at 357, quoting ***Eberhardt v. O'Malley***, 17 F.3d 1023, 1028 (7th Cir.1994).

The absence of such cases, however, does not mean a government employee is entitled to immunity for such conduct. "There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune ... because no previous case had found liability in those circumstances." ***K.H. ex rel. Murphy v. Morgan,*** 914 F.2d 846, 851 (7th Cir.1990). The controlling question is whether a reasonable government official would have understood at the time of the conduct in question that the conduct violated the Plaintiffs' constitutional rights.

In this matter, however, the United States Supreme Court has clearly established the law, by way of their decision in ***Goss v. Lopez***, 419 U.S. 574 (1975).

> [A] student's legitimate entitlement to a public education [is] a property interest which protected by the Due Process Clause and which may not be taken away for misconduct without

adherence to the minimum procedures required by that Clause. *Id.*

Numerous other cases have also expressed the due process rights of public university students. ***Dixon v. Alabama State Board of Education***, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961); ***Marin v. University of Puerto Rico***, 377 F. Supp. 613 (D.P.R. 1974); ***Crook v. Baker***, 584 F. Supp. 1531, 1556 (E.D. Mich. 1984); ***Gabrilowitz v. Newman***, 582 F.2d 100 (1st Cir. 1978).

The Fourteenth Amendment protection that is owed to Plaintiff has been clearly established as far back as ***Dixon v. Alabama State Board of Education*** 1961, or at least since ***Goss v. Lopez*** in 1975. The Defendant government officials in this case knew that Plaintiff was entitled to due process, and knew what "due process" was, but deliberately violated Plaintiff's constitutional rights by taking discipline action against her without adequate notice or a hearing. As a result, Defendants violated Plaintiff's "clearly established rights" and are not entitled to qualified immunity. ***Harlow; Saucier***.

D. PLAINTIFF HAS ADEQUATELY STATED A CLAIM FOR HER CAUSE OF ACTION PURSUANT TO 42 U.S.C. §1983.

1. PLAINTIFF HAS COMPLIED WITH FRCP 8(a).

FRCP 8(a) states, in relevant part: "A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim,

shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . ."

Plaintiff's Complaint provides detailed explanations of the allegations being made against Defendant UNLV, as well as the individual Defendants'. The due process allegations, bought pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment, detail the lack of notice, procedural defects, and lack of legitimate state interest which constitute a lack of due process. Plaintiff's Complaint also details the false arrest and unlawful seizure committed by Defendants.

Moreover, Defendants' have been provided ample notice of Plaintiff's state law allegations. Each of Plaintiff's causes of action incorporates the general factual allegations in paragraphs 23-38 of Plaintiff's Complaint.

2. PLAINTIFF HAS PROPERLY ALLEGED A DE FACTO POLICY.

This is a case where Defendants' have policies and procedures in place to adequately provide students, such as Plaintiff, procedural and substantive due process, but chose to ignore those policies and procedures and enact their own "de facto policy."

The term "policy" "generally implies a course of action consciously chosen from among various alternatives." ***City of Oklahoma v. Tuttle***, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985). ***Monell v. Department of Social Services***, 436 U.S. 658 (1978), imposes liability for injuries resulting from such a choice, if a Constitutional deprivation was "visited pursuant to governmental 'custom' even

though such a custom has not received formal approval through the body's official decision-making channels." ***Monell***, 436 U.S. at 690-91, 98 S.Ct. at 2035-36. This is also referred to as a "de facto policy."

As explained in ***Oklahoma City v. Tuttle***, once a de facto policy is established, "it requires only one application ... to satisfy fully ***Monell's*** requirement that the government be held liable only for constitutional violations resulting from the government's official policy." *Id.*, at 822.

"[I]f ... officials know or should know of the particular vulnerability, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability." ***Redmen v. County of San Diego***, 942 F.2d 1435 (9th Cir. 1991); *quoting*, ***Colburn v. Upper Darby Township***, 838 F.2d 663, 669 (3rd Cir.1988), cert. denied, 489 U.S. 1065, 109 S.Ct. 1338, 103 L.Ed.2d 808 (1989).

"A person deprives another 'of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that *causes* the deprivation of which [the plaintiff complains]." ***Leer v. Murphy***, 844 F.2d 628, 633 (9th Cir.1988); *quoting* ***Johnson v. Duffy***, 588 F.2d 740, 743 (9th Cir.1978).

Plaintiff needs not show that individual Defendants and UNLV maintained a policy affirmatively *encouraging* officials, or each other, to violate the Constitutional rights of its students; " . . . . governments may be liable under Section 1983 for

constitutional injuries inflicted by their employees if their *failure* adequately to guard against such injuries through training and supervision rises to the level of 'deliberate indifference' to the constitutional rights of citizens who come in contact with those employees. ***Doe By and Through Knackert v. Estes***, 926 F.Supp. 979, 987 (D.Nev. 1996); *citing*, ***City of Canton*** at 388.

Plaintiff's Complaint adequately alleges that Defendants' actions were taken pursuant to such a "de facto policy." As such, Plaintiff's cause of action is sufficiently plead.

3. PLAINTIFF HAS PROPERLY ALLEGED THAT DEFENDANTS HAVE VIOLATED HER CONSTITUTIONAL RIGHT TO DUE PROCESS.

The United States Supreme Court has established that students have a property interest in their education. ***Goss v. Lopez***, 419 U.S. 574 (1975).

> [A] student's legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause. *Id.*

The first case to recognize a university student's right to due process in a disciplinary hearing was ***Dixon v. Alabama State Board of Education***, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961). In this case from the civil rights era, Alabama State College expelled nine black students, without

notice and without the benefit of a hearing, (*Id.*, 158) after the students conducted a sit-in demonstration at a public courthouse lunch grill that refused service to blacks. *Id.*, 152, n.3. The Fifth Circuit Court of Appeals held that due process required notice and a hearing before a student at a tax-supported college can be expelled for misconduct. *Id.*, 158.

Furthermore, the Court made clear that a state institution may not circumvent the fundamental right to due process by conditioning a grant of admission upon students' agreeing to give up their constitutional right to due process. *Id.*, 156, citing ***Slochower v. Board of Educ.***, 350 U.S. 551, 555 (1956). The school must establish some reasonable grounds for its disciplinary actions and must do so procedurally through "fundamental principles of fairness." *Id.*, 157. The court would test fairness by examining the sufficiency of the hearing and the preceding notice. *Id.*, 158-159.

The ***Dixon*** court broadly defined the notice and hearing required in cases of student expulsion:

> [A]n opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. *Id.*, 159.

More than a decade later, the federal District Court for the District of Puerto Rico took due process a step further. In ***Marin v. University of Puerto Rico***, 377 F. Supp. 613 (D.P.R. 1974) the court held that students are entitled to:

(1) adequate advance notice of

(a) the charges,
(b) the specific, previously promulgated regulations under which the charges are brought, and
(c) the evidence against the student;

(2) a full, expedited evidentiary hearing

(a) presided over by an impartial, previously uninvolved official,
(b) the proceedings of which are transcribed, at which the student
(c) can present evidence and
(d) cross-examine opposing witnesses,
(e) with the assistance of retained counsel;

(3) a written decision by the presiding official encompassing

(a) findings of fact,
(b) the substantial evidence on which the findings rest, and
(c) the reasons for the official's conclusion. *Id.*, 623.

The ***Marin*** court held that these due process protections must be guarded most scrupulously when the university's action may damage the student's standing in the community, or may impose a stigma or "mark on one's record that may well preclude further study at any public and many private institutions and limit the positions one can qualify for after termination of one's studies." *Id.*, 622, *citing* ***Roth***, 408

U.S. 573. To date, ***Marin*** marks the outer limit of rights recognized for students.

Until the United States Supreme Court's ***Goss v. Lopez***, 419 U.S. 565 (1975) decision in 1975, jurisdictions remained split as to whether students were entitled to any due process by public educational institutions. In ***Goss***, the Court set aside the summary 10-day suspensions of nine high school students charged with various acts of disruptive conduct during school hours. *Id.* "At the very minimum," the Court held, due process required notice and an informal hearing prior to the students' suspension. *Id.*, 579 "[D]ue process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* Had the suspension exceeded 10 days the Court might have required "more formal procedures." *Id.*, 584. The Court concluded that the adequacy of the notice and the nature of the hearing sufficient to satisfy due process would vary according to an "appropriate accommodation of the competing interests involved." *Id.*, 579.

A landmark decision, ***Goss*** opened the gates for cases brought by students at all educational levels. In one example of ***Goss's*** application, ***Crook v. Baker*** 584 F. Supp. 1531, 1556 (E.D. Mich. 1984) the federal District Court for the Eastern District of Michigan held that a university student was entitled to notice and a hearing before the University of Michigan could rescind a graduate's master's degree on the grounds that he had fabricated data underlying his thesis. *Id.*

After ***Goss***, schools could no longer deny students their procedural due process, and expect to get away with it.

a. Plaintiff Has Alleged That She Was Not Provided with Notice, Thus Violating Her Fourteenth Amendment Rights.

The ***Goss*** Court determined that high school students facing the deprivation of a property right by suspension from school must, at a minimum. "be given *some* kind of notice and afforded *some* kind hearing." 419 U.S. 579 (emphasis in original). In an earlier decision, the Supreme Court had established that "[a]n elementary and fundamental requirement of due process ... is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." ***Mullane v. Central Hanover Trust Co.***, 339 U.S. 306, 314 (1950); *see also* ***Memphis Light, Gas & Water Div. v. Craft***, 436 U.S. 1, 13 (1978). Applying that standard in ***Goldberg v. Kelly,*** 397 U.S. 254, 268 (1970) (fairness in some cases may require more than seven days' notice of the termination of welfare benefits) the Supreme Court held that a few days notice is inadequate for the termination of welfare benefits. Lower courts have specifically held that notice of five days or less for an employment termination hearing is insufficient notice. ***Walker v. U.S.***, 744 F.2d 67, 70 (10th Cir.1984) (five days' notice to a public employee insufficient pre-termination notice); ***Wagner v. Little Rock School District***, 373 F.Supp. 876 (E.D.Ark. 1974) (one day inadequate to notify a school teacher of her termination hearing).

In a case involving a private college, the United States District Court for the District of Vermont reversed Middlebury College's one year suspension of a student, holding that the school deviated from its published notice policy by informing the accused student of only one of the two charges that had been brought against him. ***Fellheimer***, 869 F. Supp. at 246-47. The court held that the college must "state the nature of the charges with sufficient particularity to permit the accused party to meet the charges," as expressed in the school's policy. *Id.*

What constitutes adequate notice may be difficult to measure, but colleges and universities are clearly at an advantage over a student who may have limited or no resources with which to prepare for a hearing. The guiding principle should be that students have ample time to secure and obtain the advice of counsel, review and investigate the claims against them, and prepare a defense to the accusations made against them. Considering the limited resources of students, a notice of fewer than ten working days likely does not allow an accused student time to adequately defend himself.

Plaintiff has alleged, that despite the UNLV Student Conduct Code in place, "Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO failed to provide Plaintiff with proper notice of the formal hearing, violating her U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code." *Plaintiff's Complaint*, paragraph 33. Plaintiff's allegation of improper notice is sufficient to put Defendants on notice pursuant to FRCP 8(a).

b. Plaintiff Has Alleged That She Was Disciplined, Despite Defendants Knowledge That She Was Innocent, Thus Violating Her Fourteenth Amendment Rights.

In addition to the procedural protections outlined above, the Due Process Clause of the Fourteenth Amendment provides a guarantee against arbitrary decisions that would impair appellants' constitutionally protected interests. ***Dixon***, 294 F.2d at 157. This guarantee of "substantive due process" protects certain fundamental "substantive" rights we all share. The Supreme Court has said of substantive due process that, "the Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." ***Washington v. Glucksberg***, 521 U.S. 702, 719 (1997). It provides "heightened protection against government interference with certain fundamental rights and liberty interests." ***Id.*** at 720. As the court stated in ***Dixon***, "the governmental power to expel the plaintiffs ... is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement." ***Dixon***, 294 F.2d at 157. Under principles of substantive due process, students cannot be disciplined for constitutionally protected actions, or for actions which the government has no legitimate interest in punishing.

In addition to protecting such fundamental rights as free speech, substantive due process assures that any government action bear, at a minimum, a rational relationship to a legitimate governmental interest. In

Alabama & Coushatta Tribes v. Big Sandy School District, 817 F.Supp. 1319 (E.D. Tex. 1993), the federal District Court for the Eastern District of Texas provided two theories upon which a successful substantive due process claim may be made. "If the suspensions were patently unreasonable or disproportionate to the offense, the [students] would be entitled to relief," or, if there was a "substantial departure from academic norms," the student would also be entitled to relief. ***Id***. at 1335.

Plaintiff's Complaint explicitly states that Defendants retaliated against her for her actions against a star athlete and found her responsible for various actions despite no evidence ever being presented.

> 35. Despite the fact that no evidence was ever presented to support any of the allegations made against Plaintiff, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO found Plaintiff to be "Responsible" of said charges, completely ignoring the evidence that exonerated Plaintiff, forever tarnishing the educational transcript and record of Plaintiff, as well as causing severe psychological and physical injuries, all in violation of her U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.
>
> 36. Plaintiff filed a timely appeal of Defendants decision. However, Defendants UNLV, MILLS, CLARK, BURNS, JIMENEZ, and CARRASCO again ignored the facts and dismissed the appeal, all in violation of her U.S.

> Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSHE) Code.
>
> 37. Defendants have taken said actions against Plaintiff in retaliation for her making a complaint against a star athlete, and further retaliating against her for asserting her rights pursuant to the U.S. Constitutional Rights, the UNLV Student Conduct Code, and the Nevada System of Higher Education (NSME) Code.

These acts by the Defendants were taken without a legitimate state interest and thus violate the Plaintiff's substantive due process rights.

c. Plaintiff Has Alleged That Defendants' Ignored Their Own Due Process Safeguards, Thus Violating Her Fourteenth Amendment Rights.

It is not enough for a school to go through the motions of enacting a student conduct code. For any such code to have credibility, the institution must abide by it. In ***Lightsey v. King***, 567 F.Supp. 645 (E.D.N.Y. 1983) a student was given a grade of "zero" for cheating, even after the institution's Honor Board found him "not guilty" of the allegations. The court held that "there was no difference between failing to provide a due process hearing and providing one but ignoring the outcome. By holding the Honor Board hearing and then disregarding its result, the Academy violated ***Lightsey's*** right to due process." *Id.* At 649.

Courts review the disciplinary decisions of schools to ensure that they are not arbitrary and capricious,

and that the process is conducted with basic fairness. ***Coveney v. Pres. of Coll. of the Holy Cross***, 445 N.E.2d 136, 138 (Mass. 1983); ***Ahlum v. Administrators of the Tulane Educ. Fund***, 617 So. 2d 96, 98-99 (La. Ct. App. 1993); ***Psi Upsilon of Phila. v. University of Pa.***, 591 A.2d 755, 760 (Pa. Super. Ct. 1991); ***Anderson***, 1995 WL 813188, at * 4-*5; ***Cloud v. Trustees of Boston Univ.***, 720 F.2d 721, 725 (1st Cir. 1983).

In ***Anderson v. Mass. Inst. Of Tech.***, the Massachusetts Superior Court went so far as to adopt a rule that the court may intervene in the student-school relationship when the student demonstrates that the school's action was arbitrary and capricious, when the school failed to follow its own disciplinary rules, or when the school did not afford the student with a hearing that was fundamentally fair. ***Anderson***, 1995 WL 813188, at * 4. "Such hearings at the very least should provide the student with written notice of the charges against him or her; a written description of the evidence upon which the charges are based; the names of the witnesses which the university intends to call at the hearing; an unbiased disciplinary committee or tribunal; an opportunity to be heard and present witnesses in his behalf; and the right to confront and controvert the evidence presented by the university." *Id.*

It is fundamentally unfair when a large public university, such as Defendant', publishes a Student Conduct Code, distributes that code to the all of its students, publishes that code on its web site, holds its students accountable for abiding by that code, but then the university chooses to repeatedly ignore its own rules of due process as prescribed by the code.

Plaintiff's Complaint specifically alleges that Defendants' had these policies and procedures in place, via their Student Conduct Code and Nevada System of Higher Education (NSHE) Code, but those to ignore them. *Plaintiff's Complaint*, paragraphs 34.

4. PLAINTIFF HAS PROPERLY ALLEGED A VIOLATION OF HER FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO UNLAWFUL ARREST AND SEIZURE.

Police officers have the power to arrest citizens without a warrant if they have probable cause. See ***Atwater v City of Lago Vista***, 532 US 318, 322 (2001). A citizen who is arrested without probable cause can bring a civil action against the officer under 42 USC § 1983 for false arrest. A false arrest is a violation of the Fourth Amendment right against unreasonable seizure of persons. ***Hand v Gary***, 838 F2d 1420, 1427 (5th Cir 1988) ("The Fourth and Fourteenth Amendments guard against arrest without probable cause.").

Under § 1983, citizens may seek redress for violations of their constitutional rights by state or local officials The statute guarantees that "[e]very person who, under color of any statute, ordinance, regulations, custom or usage, or any State or Territory...subjects ...any...person...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. 42 USC § 1983 (2000). A § 1983 action has two essential elements: that the alleged injury was committed by a person acting under color of state law, and that this conduct deprived the person of a right "secured by the Constitution and the laws" of the United States. ***Flagg***

Brothers, Inc. v Brooks, 436 US 149, 155-56 (1978) (holding that a private business's action as permitted under New York Uniform Commercial Code was not "under color or state law" as required for a § 1983 claim). The primary purpose of § 1983 are "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." ***Wyatt v Cole***, 504 US 158, 161 (1992), *citing* ***Carey v Piphus***, 435 US 247, 254-57 (1978). Thus, this broad remedy protects citizens against the violation of any federal right by state officials.

Unconstitutional false arrest is a cognizable claim under § 1983, and is in fact one of the most common § 1983 claims brought against police officers (From 1989-1993, excessive force issues were the most common in § 1983 claims against police at 24 percent, and false arrest claims were the second most common at 22 percent. Forty percent of cases against the police involved both excessive force and false arrest. Scarborough and Hemmens, 21 T Jefferson L Rev at 11). An illegal arrest is an unreasonable seizure under the Fourth Amendment (*See* ***Hand v Gary***, 838 F2d 1420, 1427 (5th Cir 1988), quoting ***Thomas v Sams***, 734 F2d 185, 191 (5th Cir 1984) ("The right to be free from illegal arrest plainly enjoys [constitutional] protection."); ***Patzig v O'Neil***, 577 F2d 841, 848 (3d Cir 1978) ("Clearly, an arrest without probable cause is a constitutional violation actionable under § 1983.")), which protects "*persons*, houses, papers, and effects against unreasonable searches and seizures" (US Const Amend IV (emphasis added)). This guarantee applies to the states through the Due Process Clause of the Fourteenth Amendment. See ***Monroe v Pape***, 365 US 167, 171 (1961).

Actions for unconstitutional false arrest generally parallel the common law action of false arrest or false imprisonment. *See* ***City of Newport v Fact Concerts, Inc.***, 453 US 247, 258 (1981) ("One important assumption underlying the Court's decision in this area [tort liability under § 1983] is that members of the 42d Congress were familiar with common law principles...and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.") At common law, the elements of a false arrest claim were (1) the detention of the plaintiff, and (2) the unlawfulness of the detention. *See* ***Winn & Lovett Grocery Co. v Archer***, 126 Fla 308, 171 S 214, 218 (1936) ("[T]o recover for false arrest of the person, it must be shown that the restraint was unreasonable and such as was not warranted by the circumstances."). *See also* ***Vorholt v Vorholt***, 111 W Va 196, 160 SE 916, 917-18 (1931) ("The gist of an action for false imprisonment is the illegal detention of a person without lawful process or by an unlawful execution of such process."); ***Garrity v Fleming***, 121 Kan 42, 245 P 1054, 1055 (1926) ("False arrest or imprisonment is any unlawful physical restraint by one of another's liberty, whether in prison or elsewhere.").

Police officers may make arrests without a warrant, but the lawfulness of that arrest turns on whether there was probable cause. ***United States v Watson***, 423 US 411, 417 (1976). For the purposes of a false arrest claim, probable cause exists where the officer had "reasonably trustworthy information" of facts and circumstances that would lead a "prudent man" to believe that an offense had been committed. ***Karr v Smith***, 774 F2d 1029, 1031 (10th Cir 1985) (discussing when an officer has probable cause to make an arrest,

including the "fellow officer" rule that allows probable cause to be determined according to the collective information possessed by all officers involved). Probable cause has been described by the Supreme Court as a "practical, nontechnical" requirement that balances the competing interests of effective law enforcement and the protection of citizens' rights. ***Brinegar v United States***, 338 US 160, 176 (1949). In practical terms, a court determines whether there was probable cause by examining the circumstances of the arrest and deciding whether the "historical facts" available at the time of the arrest, "viewed from the standpoint of an objectively reasonable police officer, amount to...probable cause." ***Ornelas v United States***, 517 US 690, 696 (1996) (stating that probable cause is not a "finely-tuned standard" but instead is a fluid concept that depends on the particular circumstances of a situation.).

For the purposes of a § 1983 action, probable cause does not depend upon what the magistrate found at the preliminary hearing or arraignment. ***Whitley v Seibel***, 613 F2d 682, 685 (7th Cir 1980) (explaining that a court will assess the presence of probable cause in a § 1983 false arrest action using a "reasonable man standard" regardless of the magistrate's ruling). If a magistrate determines that no probable cause existed to hold the suspect for the crime, that does not automatically make the officer liable in a § 1983 action. The question is whether a reasonable office would have believed there was probable cause at the time of the arrest, regardless of what the magistrate eventually found at the probable cause hearing, or what the grand jury found at the arraignment. ***Id.***

The Ninth Circuit places the burden of proof for probable cause on the defendant. ***Dubner v City and County of San Francisco***, 266 F3d, 959, 965 (9th Cir 2001) (explaining that the arresting officer has the burden of showing probable cause once the plaintiff makes a prima facie case of unlawful arrest.). The initial burden is on the plaintiff to establish an invasion of his rights, that is, an illegal arrest, and the plaintiff can make a prima facie case, "simply by showing that the arrest was conducted without a valid warrant." ***Dubner***, 266 F3d at 965. Once the plaintiff makes a prima facie case, the burden shifts to the defendant to produce evidence of probable cause. ***Id***. An arrest made without a warrant is presumptively unlawful if the defendant "is unable to or refuses to come forward with any evidence that the arresting officers had probable cause." ***Id***.

Thus, the defendant bears the burden of production, and must introduce enough evidence on the issue of probable cause so that the issue can be decided by the factfinder rather than on summary judgment.

The Ninth Circuit advances a policy rationale-that the defendant officers should bear the burden of production because they have the best access to the evidence that would tend to prove or disprove probable cause. ***Dubner***, 266 F3d at 965 ("This minimal burden shifting forces the police department, which is the better position to gather information about the arrest, to come forward with some evidence of probable cause."). Thus, the Ninth Circuit places the burden of production on the defendant officers because they, not the plaintiffs, have the best access to the information

and can most cost-effectively produce this evidence at trial. ***Id.***

Plaintiff was arrested by Defendants on a charge of felony assault with a deadly weapon. Defendants wrongly assert that Plaintiff was not exonerated of the charges against her. The minutes of the Las Vegas Justice Court, which were attached as *Exhibit 1* to their Motion, clearly show that Plaintiff was never adjudicated "guilty" of any crime, and that the charges against her were "dismissed." No judge ever made any finding that the Defendant Officers had any probable cause at the time of Plaintiff's arrest. To the contrary, the charge was later amended to a misdemeanor disorderly conduct, and then dismissed. It is impossible for Defendants to meet their burden pursuant to ***Dubner*** on a motion to dismiss. Plaintiffs Complaint is properly plead, and must proceed to trial. *See* ***Id.***

E. PLAINTIFF'S STATE CLAIMS EACH SUFFICIENTLY ALLEGE A PROPER CAUSE OF ACTION.

1. BEACH OF CONTRACT.

Courts have held that schools may not deviate from the express due process protections established in their student conduct codes, whether they are public or private, as such deviations would violate the implied contractual interests of the student. ***Tedeschi v. Wagner College***, 404 N.E. 2d 1302 (N.Y. 1980).

To understand whether a contract exists between a student and an institution, one must examine the elements of a contract. A contract requires that there

be a bargain which includes both a manifestation of mutual assent to the exchange and "consideration." *Restatement (Second) of Contracts* §17(1). In contract law parlance, consideration is the returned promise or performance bargained for. *Id.* For example, a student pays tuition in consideration for an education. An institution provides education in consideration for tuition.

The terms of a contract need not be fully expressed and contained within a formal document, but may be implied by law or from the parties' conduct or other evidence of mutual assent. *3A.* ***Corbin Contracts*** § 541 AT 97 (1960); See also ***Wagenseller v. Scottsdale Memorial Hospital***, 710 P.2d 1025, 1036 (Ariz. 1985) (opinion superseded by statute). There are two types of implied contracts, implied-in-fact and implied-in-law. ***Wagenseller***, 710 P.2d at 1036. An implied-in-fact contract is one that is inferred from the statements or conduct of the parties. *Id.* "It is not a promise defined by the law, but one made by the parties, though not expressly." *Id.* Student conduct codes, for example, are implied-in-fact contracts. In contrast, an implied-in-law duty arises when the contract is silent, but the law requires that a duty be imposed even though the parties may not have intended it. *Id.*, citing 1 A. ***Corbin***, supra note 21, §17, at 38.

A contractual relationship begins when the institution accepts the student's application for admission. ***Curtis J. Berger & Vivian Berger, Academic Discipline: a Guide to Fair Process for the University Student***, 99 Colum. L. Rev. 289, 318-19 (1999). The effect of the acceptance is to make an irrevocable offer to the successful applicant, usually

for a limited period time, for a seat in the entering class. By making a deposit before the offer expires, the applicant extends the offer until the beginning of the school year. Before classes start, the applicant will arrive on campus and register, thereby becoming an enrolled student. If the student is a degree candidate, he or she expects to be offered a curriculum which, if completed satisfactorily, will lead to the degree. The student further expects that the school will treat him or her fairly, including not being subjected to arbitrary grading or dismissal, extreme tuition hikes, or a sizable escalation of the degree requirements. These expectations are implied-in-law terms of the contract the student enters into with the institution. Though not explicitly spelled out, they are essential to the student's ability to benefit from the bargain he entered into with the institution, and are thus implied (by law) as part of the contract. Payment of a student's tuition constitutes consideration for these expectations. *Id.*

In return, the school expects payment of tuition and fees and compliance by the student with a set of rules, both academic and non-academic, as a member of the university community. The school's expectations, like those of the student, are implied-in-law terms of the contract. These mutual understandings and expectations form the essence of a contractual relationship. *Id.*

An additional, and essential, part of the student-university relationship is the implied-in-fact contract created by a written student conduct code. Usually issued annually, the student conduct code is one of the primary documents used by the school to describe to students the academic and non-academic requirements and limitations placed upon them. The

student conduct code puts students on notice that their continued enrollment is subject to their obedience of the school's rules, and also informs them of the procedures to be followed in the event of any alleged disobedience. The written code provides the terms and conditions to be followed by both the school and the student, thus creating an implied-in-fact contract between the school and the student.

In ***Tedeschi v. Wagner College,*** 404 N.E. 2d 1302 (N.Y. 1980) a private college suspended a part-time student because of her alleged disruptive and abusive conduct during and outside class. The student filed suit seeking monetary damages and reinstatement in the college. *Id.*, 1304. She alleged that the school had not given her a hearing or any opportunity to defend herself. *Id.* The New York state trial court entered judgment for the defendant, holding that the United States Constitution did not apply because the private college was not "state involved" and because the school's informal procedure was carried out in good faith and was not arbitrary. *Id.* After a split Appellate Division affirmed, the New York Court of Appeals reversed, ordering that the student be conditionally reinstated. *Id.*, 1307.

The court pointed to a college brochure, "***1976-1977 Guidelines of Wagner College,***" which outlined Wagner's procedure for adjudicating academic and non-academic suspension or dismissal. *Id.*, 1304. The college had failed to convene the Student-Faculty Hearing Board, which the guidelines required, prior to suspending the student. *Id.*, 1306. On appeal, she argued that the student-private college relationship is contractual and that an implied term of the contract is that the school will observe its own rules. *Id.*, 1305.

In short, New York's highest court held:

> Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat *one-sided* relationship between the institution and the individual, we hold that when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed. *Id.*, 1306. (emphasis added).

Since ***Tedeschi***, a number of other courts have required private schools to act in accordance with their published policies. ***Fellheimer v. Middlebury Coll.***, 869 F. Supp. 238, 244 (D. Vt. 1994) (college breached its contractual duty when it failed to put student on notice of all charges against him); ***Holert v. Univ. of Chi.***, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (student is entitled to the procedural safeguards that the school agreed to provide); ***Schaer v. Brandeis Univ.***, 735 N.E.2d 373, 381 (Mass. 2000) (a university should follow its established rules); ***Anderson v. Mass. Inst. of Tech.***, 1995 WL 813188, *1, *4 (Mass. Super. 1995) (courts may intervene when school's action was arbitrary and capricious). For example, in ***Fellheimer v. Middlebury College***, the United States District Court for the District of Vermont held that Middlebury College was contractually bound to provide students with the procedural safeguards and rights it promised in its publications. 869 F. Supp. at 241. To deviate from those published procedures would make the hearing fundamentally unfair. *Id.*, 246.

In addition, a university's suspension or other punishment of a student without good cause, violates the covenant of good faith and fair dealing, which is an implied-in-law term of the contract. *See* 3 ***A. CORBIN***, *supra* note 17, § 541 at 97. *See also* 5 S. WILLISTON, THE LAW OF CONTRACTS § 670 at 159 (3d ed. 1961); ***Wagenseller***, 710 P.2d at 1038, ***citing Restatement (Second) of Contracts*** § 205; ***Savoca Masonry Co. v. Homes & Son Construction Co.***, 542 P.2d 817, 821 (Ariz. 1975). The covenant of good faith and fair dealing requires that neither contracting party do anything that will injure the right of the other to receive the benefits of their agreement, *See* ***Wagenseller***, 710 P.2d at 1038, ***citing Comunale v. Traders & General Insurance Co.***, 328 P.2d 198, 200 (Cal. 1958); ***Fortune v. National Cash Register Co.***, 364 N.E.2d 1251, 1257 (Mass. 1977) in this case the right of the student to receive an education, and the right of the university to educate others. It imposes on the school a good faith duty, at a minimum, to substantially adhere to its published disciplinary procedures. In certain circumstances, breach of contract, including breach of the covenant of good faith and fair dealing, may provide the basis for a tort claim. *See Id.* at 1038-39, *citing* ***Noble v. National American Life Insurance Co.***, 624 P.2d 866, 868 (Ariz. 1981); ***Seamen's Direct Buying Service v. Standard Oil Co. of California***, 686 P.2d 1158 (Cal. 1984); ***Wallis v. Superior Court***, 207 Cal.Rptr. 123 (1984); ***Gates v. Life of Montana Insurance Co.***, 638 P.2d 1063 (Mont. 1982).

In ***Napolitano v. Trustees of Princeton University***, 453 A.2d 279 (N.J. Super. Ct. Ch. Div. 1982), a New Jersey state court held that a university disciplinary hearing, which resulted in the withholding

of the student's degree for one year, failed to comply with the university's own rules when the student was not timely informed that she had the right to cross-examine witnesses. The court ordered the disciplinary committee to rehear the matter and, at that hearing, to allow the plaintiff to call any witnesses she wished and to cross-examine any witnesses presented against her, as the school rules provided. *Id.*, 281-82.

Princeton had not refused to allow the student to cross-examine adverse witnesses, but had failed to inform her in timely fashion that she had such a right. *Id.*, 281. While the term "good faith" was not used by the court, the court appears to have been saying that the university had a good faith contractual duty to timely inform the student that she had a right to cross-examine witnesses, in addition to its duty to protect the right as expressly stated in the student handbook.

Another issue to be considered is the bargaining strength of the contracting parties. The contract between a student and a school is almost always prescribed by the institution, with the student having virtually no bargaining power. Contracts of adhesion create one party that has no bargaining power or ability to participate in the drafting of the contract, making that party weaker. The Restatement of Contracts, dealing with standardized agreements, allows courts to consider the "reasonable expectations" of the weaker party. ***Restatement (Second) of Contracts***, §211. Standardized Agreements. Moreover, if an entity performs a service of "great importance to the public," the courts must give greater than usual scrutiny to the terms of the entity's

standardized contract with a weaker party. ***Restatement (Second) of Contracts***, §195. This power imbalance goes to the very essence of the "one-sided relationship" described by the ***Tedeschi*** court in reinstating a part-time student based on the school's failure to follow its own procedures. ***Tedeschi v. Wagner College***, 404 N.E.2d 1302, 1306 (N.Y. App. Ct. 1980).

Like the above cases, UNLV and the Nevada System of Higher Education (NSHE) has established a conduct codes and rules, published them in its handbook, published them on their website, and is requiring its students to live by those Codes. They too are required to honor it. By promising Plaintiff that she would have the right to be represented by counsel at her hearing, and then revoking that right just minutes before her hearing was to begin. Plaintiff relied not only upon the representations made in the NSHE Code, but also the express assurances in writing that she would be allowed to be represented by counsel. By conducting said hearing and refusing to allow Plaintiff to be represented by counsel, they breached their contract with Plaintiff. By failing to include the name of the complainant in the formal hearing notice, they breached their contract with Plaintiff. By finding Plaintiff responsible for an act, despite the fact that no evidence existed, thus violating Plaintiff's due process, they breached their contract with Plaintiff. By failing to correct these material failures on appeal, they breached their contract with Plaintiff. This cause of action is sufficiently plead in Plaintiff's Complaint.

2. NEGLIGENCE.

"To prevail on a negligence theory, a plaintiff must generally show that: (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty; (3) the breach was the legal cause of plaintiff's injury and (4) the plaintiff suffered damages." ***Doud v. Las Vegas Hilton Corporation***, 109 Nev. 1096, 864 P.2d 796 (Nev. 1993).

In the present case, Defendants' owed a duty of care to each of their students who paid tuition to be enrolled at their University. The Defendants breached that duty by refusing to treat Plaintiff with fundamental fairness and afford her the due process she was promised in Defendants' Student Conduct Code. Plaintiff has suffered severe damages as a result of the interruption in her education, future economic injuries, emotional damages and upset. For all of the foregoing reasons, this Honorable Court should deny Defendants' Motion to Dismiss on the negligence claim.

3. NEGLIGENT HIRING, TRAINING, AND SUPERVISION.

The duty of reasonable care in hiring has been established to ensure employers conduct reasonable background checks on potential employees, to ensure that the employee is fit for the position. ***Hall v. SSF, Inc.***, 930 P.2d 94, 98-99 (Nev. 1996); *quoting* ***Burnett v. C.B.A. Sec. Serv., Inc.***, 820 P.2d 750, 752 (Nev. 1991). The employer breaches this duty if it fails to conduct a reasonable background check or if the employer knew, or should have known, of an employee's dangerous propensities. See, ***Id.***

Additionally, employers can be held liable for negligently training their employees. ***Vinci v. Las Vegas Sands, Inc.***, 984 P.2d 750, 751 (Nev. 1999). Finally, when an employer actively supervises the employees, controls both the details and methods of how the employee performs their work, had the ability to terminate the employee's employment, the employers failure to supervise is subject to a claim of negligence. ***Rockwell, Jr. v. Sun Harbor Budget Suites***, 925 P.2d 1175, 1182 (Nev. 1996).

The individual Defendants in this case were employed and put in the positions they are in, despite not having the proper qualifications to understand and safeguard the constitutional and due process rights of students. Moreover, individual Defendants were not properly trained upon hiring and were not adequately supervised to ensure that the constitutional and due process rights of students were being protected. Even more egregious, Defendant UNLV and individual Defendants were aware that their employees were violating the constitutional rights of students, and violating the UNLV Student Conduct Code and NSHE Code, but turned a blind eye to this know behavior. As a result of the negligent hiring, training, and supervision, Plaintiff was subjected to a violation of her constitutional and civil rights.

4. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

In order to establish a cause of action for intentional infliction of emotional distress, a plaintiff must establish: (1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff suffered

severe or extreme emotional distress, and (3) actual or proximate causation. ***Olivero v. Lowe***, 116 Nev. 395, 398,995 P.2d 1023 (2000); ***Star v. Rabello***, 97 Nev. 124, 125, 625 P.2d 90 (1981). Extreme and outrageous conduct is that which is "'outside all possible bounds of decency' and is regarded as 'utterly intolerable in a civilized community.'" ***Maduike v. Agency Rent-A-Car***, 114 Nev. 1, 4, 953 P.2d 24 (1998).

In the case at bar, Plaintiff alleges and has set forth facts proving that the Defendants conduct constitutes: (1) extreme and outrageous conduct; (2) committed in reckless disregard of the probability that the Plaintiff would suffer severe emotional distress; (3) which resulted in Plaintiff suffering severe emotional distress; and (4) which was proximately caused by the Defendants acts. Defendants have acted with reckless disregard to the probability that the Plaintiff would suffer emotional distress by intentionally and falsely arresting Plaintiff and depriving her of due process. These actions were deliberately intended to hurt Plaintiff, despite the fact that as University officials, Defendants' were supposed to protect Plaintiff from harm.

5. CIVIL CONSPIRACY

A Plaintiff is entitled to go to trial on a claim on civil conspiracy, when the evidence presents a possible inference of such a conspiracy. ***United Steel Workers of America v. Phelps Dodge Corp.***, 865 F.2d 1539, 1546-47 (9th Cir. 1989). In that case, the Ninth Circuit held that Phelps Dodge's frequent interaction with the local police department, at least created an inference of a conspiracy that should be resolved by the finder of fact. ***Id.***

In the case at bar, Plaintiff's Complaint has presented numerous examples of the inseparable relationship between the Defendants. This direct evidence allows an inference to be drawn from the abundant circumstantial evidence that Plaintiff's claims are "justifiable" and "legitimate." ***Matsushita Electric v. Zenith Radio***, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356 (1986). The Defendants powerful stature, combined with their inseparable relationship with the each other, provide "undisputed background or contextual facts," ***T.W. Electrical Service v. Pacific Electrical Contractors***, 809 F.2d 626, 631 (9th Cir. 1987), from which the jury could legitimately draw inferences. The jury would be justified in inferring that the Defendants had both the ability and the opportunity to conspire with each other. The ability and opportunity to conspire, while insufficient alone, constitute circumstantial evidence of actual participation in the conspiracy. See ***Adickes v. S.H. Kress & Co.***, 398 U.S. 144, 158, 90 S.Ct. 1598, 1609 (1970). This circumstantial evidence does not stand alone, but rather serves to buttress the direct evidence and the permissible inferences arising from it. In addition an act done for a legitimate purpose in furtherance of a conspiracy may, together with other evidence, be evidence of a conspiratorial purpose. ***Braverman v. United States***, 317 U.S. 49, 53, 63 S.Ct. at 99, 101 (1942).

6. DEFAMATION, LIBEL, SLANDER PER SE.

As a general rule, a slanderous statement, no matter how insulting or defamatory, is not actionable unless actual or "special" damages are proven. ***Branda v. Sanford***, 97 Nev. 643 (1981); citing ***Modla v. Parker***, 495 P.2d 494 (Ariz.App.), *cert. denied* 409

U.S. 1038 (1972); ***Kirk v. Village of Hillcrest***, 335 N.E.2d 535 (Ill.App. 1975); W. Prosser, Law of Torts, 112 (4th ed. 1971). A statement is considered slander *per se*, *i.e.*, actionable without a showing of such special damages, only if it falls into one of usually four categories: (1) imputations that plaintiff has committed a crime; (2) imputations that would injure plaintiff's trade, business or office; (3) imputations that the plaintiff has contracted a loathsome disease; and, the category relevant for our purposes, (4) imputations of unchastity in a woman. ***Branda***, 97 Nev. at 646; citing ***Atkinson v. Equitable Life Assur. Soc'y***, 519 F.2d 1112 (5th Cir. 1975) (Florida law); ***Gulf Constr. Co. v. Mott***, 442 S.W.2d 778 (Tex.Civ.App. 1969); ***Restatement (Second) of Torts*** § 570 (1977).

Defendants made numerous statements that Plaintiff was a violent criminal, thus severely harming her reputation. These statements meet the first criteria for slander per se, as an imputation that Plaintiff has committed a crime. ***Branda***, 97 Nev. at 646.

It is generally accepted that for both libel and slander it is a question of law and, therefore, within the province of the court, to determine if a statement is capable of a defamatory construction. ***Branda***, 97 Nev. at 646; *citing* ***Thompson v. Powning***, 15 Nev. 195 (1880); R. Sack, ***Libel, Slander and Related Problems***, 72 (P.L.I. 1980). If susceptible to different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury. *Thompson*, supra.

Plaintiff intends to present evidence and witnesses to establish that these statements by Defendant are

completely false, and damaged Plaintiff. As a result, Plaintiff's cause of action for defamation, libel and slander per se should not be dismissed.

7. MALICIOUS PROSECUTION / ABUSE OF PROCESS

In Nevada, the elements of a malicious prosecution claim are: "(1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage." ***LaMantia v. Redisi***, 38 P.3d 877, 879 (Nev. 2002). "A malicious prosecution claim requires that the defendant initiated, procured the institution of, **or** actively participated in the continuation or a criminal proceeding against the plaintiff." ***Id.*** at 879-880(emphasis added).

The two elements required to establish the tort of abuse of process are: "(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding." ***Posadas v. City of Reno***, 109 Nev. 448, 457, 851 P.2d 438, 444-45 (1993), *citing* ***Kovacs v. Acosta***, 106 Nev. 57, 59, 787 P.2d 368, 369 (1990). An ulterior purpose is any improper motive underlying the issuance of legal process. ***Laxalt v. McClatchy***, 622 F.Supp. 737, 751 (D.Nev.1985). A showing of malice and want of probable cause is not necessary to recover for abuse of process. ***Bull v. McCuskey***, 96 Nev. 706, 709, 615 P.2d 957, 960 (1980), *overruled in part on other grounds by* ***Ace Truck v. Kahn***, 103 Nev. 503, 746 P.2d 132 (1987); ***Nevada Credit Rating Bur. v. Williams***, 88 Nev. 601, 606, 503 P.2d 9, 12 (1972). In ***Bull***, this court upheld a jury award for abuse of process where

the respondent's attorney, with knowledge that there was no basis for the claim, brought suit against a physician for medical malpractice with the ulterior purpose of coercing a nuisance claim settlement. ***Bull***, 96 Nev. at 707, 709, 615 P.2d at 959-60. In ***Nevada Credit Rating Bur.***, this court sustained an award for abuse of process where the respondent attached property valued greatly in excess of the alleged debt with the ulterior purpose of coercing payment. ***Nevada Credit Rating Bur.***, 88 Nev. at 606-07, 503 P.2d at 12-13.

In ***Posadas***, the Nevada Supreme Court ruled that the district court erred in granting summary judgment to the City of Reno on the issue of abuse of process. ***Id***. In that case, the plaintiff alleged that the City filed criminal charges against him for the purpose of forcing him to resign his position as a police officer. ***Id***. Likewise, the only reason Defendants brought charges against Plaintiff was an attempt to protect their star athlete, and later, to justify the false arrest of Plaintiff and attempt to hinder any civil claims she may have.

Defendants clearly did not have any legal authority to arrest and jail Plaintiff. Moreover, Defendants certainly did not have any basis to trump up bogus student conduct code charges against Plaintiff, other than to retaliate against her for asserting her constitutional rights, and attempt to justify the arrest of Plaintiff.

F. IN THE EVENT THAT THIS COURT IS INCLINED TO GRANT ANY PORTION OF DEFENDANTS' MOTION, PLAINTIFF REQUESTS LEAVE TO AMEND COMPLAINT.

While Fed. R. Civ. P. 15 places leave to amend within the sound discretion of the trial court, the 9th Circuit has stressed that a court must remain guided by "the underlying purpose of Rule 15 . . . to facilitate decision on the merits, rather than on the pleadings or technicalities." ***United States v. Webb***, 655 F.2d 977, 979 (9th Cir. 1981); *see also* ***Conley v. Gibson***, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

The standard for granting leave to amend is generous. In ***Scott v. Eversole Mortuary***, 522 F.2d 1110, 1116 (9th Cir. 1975) the 9th Circuit reversed the district court's dismissal of plaintiff's count insofar as it denied leave to amend because it could "conceive of facts" that would render plaintiff's claim viable and could "discern from the record no reason why leave to amend should be denied." Similarly, in ***Breier v. Northern California Bowling Proprietors' Ass'n***, 316 F.2d 787, 789-90 (9th Cir. 1963) this Court held that leave to amend should be granted if underlying facts provide proper grounds for relief or if the complaint can be saved by amendment. Leave to amend should be granted "if it appears at all possible that the plaintiff can correct the defect." *Id.* at 790 (quoting 3 Moore, Federal Practice, § 15.10 at 838 (2d ed. 1948)).

The factual history of the events giving rise to this litigation are extensive. In the unlikely event that this Court were to find any of Plaintiff's causes of action

insufficient, leave to amend is graciously requested. Plaintiff strongly believes that this Court could "conceive of facts" that would render his claims valid, if he were permitted to amend. ***Scott v. Eversole Mortuary***, 522 F.2d 1110 (9th Cir. 1975).

III.

CONCLUSION

Having established that Plaintiff's Complaint is sufficiently plead, and that each cause of action sufficiently states a claim for which relief may be granted, Plaintiff prays that this Court will deny all Defendants' Motion to Dismiss.

DATED this 10th day of July, 2008.

THE BACH LAW FIRM, LLC

By: */s/ Jason J. Bach*
JASON J. BACH, ESQ.
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Attorney for Plaintiff

[*Certificate of Service omitted in printing this appendix*]

* * *

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
THE HONORABLE JAMES C. MAHAN, JUDGE PRESIDING

NO. 2:08-CV-0417-JCM-GWF

[Filed November 25, 2008]

MEGAN KRAINSKI,	)
	)
Plaintiff,	)
	)
vs.	)
	)
STATE OF NEVADA EX. REL. BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, et al.,	)
	)
Defendants.	)

MOTION HEARING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, OCTOBER 14, 2008

1:30 P.M.

APPEARANCES:

For the Plaintiff: JASON BACH, ESQ.

For the Defendants: RICHARD LINSTROM, ESQ.
CHRISTIAN GABROY, ESQ.

Reported by: Joy Garner, CCR 275
Official Federal Court Reporter

[p.2]

LAS VEGAS, NEVADA, TUESDAY,
OCTOBER 14, 2008

1:30 P.M.

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P R O C E E D I N G S

THE CLERK: This is the time set for the hearing of Defendant Kenya Polee's motion to dismiss, Civil Case Number 2:08-CV-0417-JCM-GWF, Megan Krainski versus State of Nevada, and all others.

Counsel, please note your appearance for the record.

THE COURT: Mr. Bach?

MR. BACH: Jason Bach on behalf of the plaintiff.

THE COURT: Thank you.

Mr. Linstrom?

MR. LINSTROM: Your Honor, Richard Linstrom here for the state defendants.

THE COURT: Thank you.

MR. GABROY: Judge, Christian Gabroy on behalf of Defendant Kenya Polee and Third-Party Plaintiff Kenya Polee.

THE COURT: All right. Thank you.

All right, I've reviewed this

[p.3]

with my brain trust. Let me tell you what I'm inclined to do, and I'll give you all a chance to argue. What I'm inclined to do is to dismiss the federal claims and let me tell you the rationale. I think the Eleventh Amendment bars a lawsuit against the state, you know, sovereign -- unless the state waives sovereign immunity.

UNLV is a state instrumentality and its employees are state employees protected in their official capacities by the Eleventh Amendment. As far as the employees acting in their individual capacities, I think they are entitled to qualified immunity. State officials in their individual capacity are protected from civil liability arising from discretionary acts that do not violate clearly established constitutional rights.

And, of course, the case that you've all referred to, Saucier versus Katz, but first to -- the first inquiry is whether an official's conduct violated the person's constitutional rights. And then, second, the

constitutional rights were clearly established at the time of the incident so that a reasonable official would have known that this conduct was

[p.4]

unlawful.

And here it seemed like there are three constitutional claims. One is procedural due process, but if you look at the cases that the defendants cite, and Dixon versus Alabama State Board of Education which, of course, is Fifth Circuit, but the Goss case which is a United States Supreme Court case, but in Goss the Goss Court held that due process does not require even the opportunity to secure counsel to confront and cross-examine the witnesses supporting the charge or to call her own witnesses to verify her version of the incident.

I mean so it's an very limited procedural due process. Counsel is not a required element of student due process claims, and so it seems like the due process claim just doesn't pertain. As far as substantive due process -- does she pronounce her name Kreenski (phonetic) or Kranski (phonetic)?

MR. BACH: Krainski.

THE COURT: Krainski -- failed to allege any fundamental liberty or property interest that should be protected by the court

[p.5]

aside from those associated with the due process claim. I'm turning now to substantive due process, but again she failed to allege any fundamental liberty or property interests that should be protected by the court apart from those that were raised in the procedural due process claim.

Now, the third possible federal claim is search and seizure, the Fourth Amendment and whether -- the question is whether a reasonable officer would have believed that there was cause to believe that a crime had been committed and the suspect had committed that crime. Here Krainski was charged with a crime. She was not exonerated from the charges that she alleges, rather the court minutes reflect that she was initially charged with a felony. The charged was reduced to a misdemeanor, and then the charge was eventually dismissed with a diversion that she successfully completed.

So there are no federal claims then remaining from the plaintiff, and so what I would be inclined to do then is not to keep the state court claims, but to send you to state court to litigate any of those claims, but I just

[p.6]

don't see -- I'm a court of limited jurisdiction and I don't see any federal court claim here.

Now, Mr. Linstrom, you can talk me out of that. It's your motion so you get the first bite at the apple.

MR. LINSTROM: We'll submit, your Honor.

MR. GABROY: Nothing, your Honor.

THE COURT: All right, Mr. Bach?

MR. BACH: Your Honor, just briefly. You've addressed all the issues that pertain to the motion to dismiss. The issue of substantive due process, the fundamental argument that we're making here is that this was essentially a conspiracy concocted by certain defendants, not all of the defendants, but certainly Defendant Pini and Wallenfeldt along with Defendant Polee to basically set up Ms. Krainski to be arrested so to -- essentially to get her kicked out of this room. It's a retaliation argument if that is true.

THE COURT: But she could have a fundamental right to be on the track team for that to pertain, doesn't she?

MR. BACH: No, my client as an

[p.7]

individual is not on the track team. She was just a student.

THE COURT: Oh, all right.

MR. BACH: And we're arguing she has a fundamental right to be a student.

THE COURT: All right.

MR. BACH: And as having that fundamental right as a student, she also has a right not to be conspired against to be kicked out of school or -- you know, she wasn't eventually kicked out of school, but that's ultimately what they were hoping to do here, but they were successful in having her arrested. They were successful in having the Student Conduct Code Board take action against her. We argue that under Goss she does have a fundamental right to an education. She has a right not to be conspired against and retaliated against because she had an issue with the star athlete.

Dealing with the issue of the Fourth Amendment exoneration and whether or not she was or was not exonerated, what the court minutes reflect is that the matter was submitted to the judge. Judge Bennett did not make a finding of guilt. There is no judgment of guilt.

[p.8]

There was nothing. Now, the fact that the minutes reflect that the defendant in that case -- the plaintiff in this case -- entered into some sort of diversion program where she'd take an impulse control class.

The fact that she had already done so at the time of the hearing, the judge then dismissed the matter. There was no adjudication in that matter. A diversion perhaps, an adjudication of guilty, no. All there is is an exoneration, and the matter was dismissed.

THE COURT: Well, except a dismissal is not an exoneration. A matter can be dismissed for any number of reasons. I mean let's say that I bring a

charge against somebody and then I fail to show up and the judge says, well, where is Mr. Mahan? He's supposed to prosecute the claim. Well, he's not here. All right, then the case is dismissed. I mean let's assume that you assault and batter me and so I'm in a cast and there's no question that you committed this, but if I fail to show up, the judge is going to say, where's the complaining witness? Well, he's not here, your Honor. Okay, well, dismissed then.

[p.9]

Do you understand what I'm saying? Not that you were exonerated, but there are a lot of things that can make a case be dismissed. It's not like if you're dismissed, that equals exoneration.

MR. BACH: Right, I understand. Perhaps in the -- the courts haven't necessarily been crystal clear on this issue of what constitutes exoneration for the purposes of a 1983 case. In fact, even within the Ninth Circuit there seems to me some split decisions as to what exoneration means.

THE COURT: We are talking about the Ninth Circuit, so there is always going to be cases on every side.

MR. BACH: Sure, absolutely. So we would ask that the Court reconsider it's position on that issue.

THE COURT: Okay, all right.

MR. BACH: And reconsider the issue of substantive due process and whether or not our client had a right to be free from these individuals within the

university conspiring and retaliating against her. You know, that's not a procedural due process issue. That's a

[p.10]

substantive due process issue because she has a fundamental right to an education, and there is certainly nothing within the Student Conduct Code that addresses the issue of university employees retaliating against a student, but as a substantive due process issue, we would ask that you reconsider on that issue as well.

THE COURT: All right.

Mr. Linstrom?

MR. LINSTROM: Your Honor, I believe most of these questions have been addressed by our pleadings, but just in terms of the exoneration issue, I think it's only relevant in terms of was there grounds for the arrest, and the facts pled by plaintiff even say that, well, the police knew or should have known that they received a false report.

Well, we know that the report itself can be the basis for a valid arrest and a basis for probable cause, therefore, in some ways the exoneration is almost, I would say, beside the point in terms of the 1983 action. The other thing I would suggest is the term "retaliation" is not properly used in this context because that talks about action taken in response to or in

[p.11]

punishment for exercising a legitimate right.

THE COURT: That's right.

MR. LINSTROM: The fact that people maybe by the time they get around to doing the disciplinary hearing don't care for someone --

THE COURT: Well, retaliation, that's your point. Retaliation is you do something, like you report me to the authorities, and I say, okay, I'm going to retaliate against you have, Mr. Linstrom, and not just attack you somehow. I mean retaliation is -- retaliation is like payback if you will, and it's just not here. It's not pled.

MR. LINSTROM: Right, and that wasn't what was pled. This is not -- it wasn't pled as a retaliation. It was pled as a civil rights violation, and I believe we've taken care of those or confronted those issues in our original reply.

THE COURT: Yeah.

MR. LINSTROM: Thank you.

THE COURT: Thank you. And I just don't see the federal claims and I'm not inclined to keep the -- I'm a Court of limited jurisdiction. I'm not inclined to keep the state

[p.12]

law claims here. So what I'm inclined to do is to dismiss the lawsuit and let you bring it, if you want to,

in state court, but again on the merits, and I think I've told you I think the state officials in their official capacity are entitled to protection under the Eleventh Amendment.

So now there is a hearing tomorrow. I understand we've got more motions coming up tomorrow. I don't know whether they are now rendered moot.

MR. LINSTROM: Your Honor, just so I'm clear, the motion for sanctions that was also on today, I take it the Court is looking at that as moot.

THE COURT: Yeah, and I just don't think that's -- I think it's litigation, and so I'm inclined to deny that. Thank you. Yeah, you're right, and I'm going to deny that.

MR. GABROY: And then, Judge, tomorrow the motions involve my third-party complaint --

THE COURT: Right.

MR. GABROY: -- against the university involving the student athlete that we allege that there was a right violated to the level of a 1983

[p.13]

action against the university. That's scheduled for 10:00 a.m. tomorrow.

THE COURT: So, all right, we'll deal with that tomorrow then. All right.

MR. GABROY: Thank you, Judge.

THE COURT: All right. So, Mr. Linstrom, if you would, prepare an appropriate order granting your motion and denying the motion for sanctions.

MR. LINSTROM: Very well. Thank you.

THE COURT: Thank you. We will be in recess.

(Whereupon, the proceedings concluded.)

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter.

Date: November 24, 2008 /s/ Joy Garner
JOY GARNER, CCR 275
U.S. Court Reporter